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No. _____

In The

Supreme Court of the United States

Frank Colacurcio, Jr., David Ebert,
and Steve Fueston, d/b/a DDF&S Investment Co.,

Petitioners,

v.

City of Kent,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

P. CAMERON DEVORE
KRAIG BAKER
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101

GILBERT H. LEVY*
Suite 200
Market Place Two
2001 Western Avenue
Seattle, WA 98121
(206) 443-0670

Counsel for Petitioners Frank Colacurcio, Jr., David Ebert, and Steve Fueston, d/b/a DDF&S Investment Co.

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. What is the appropriate level of First Amendment protection for sexually explicit non-obscene speech, and what is the standard for measuring regulations that abridge such speech, assuming it is entitled to lower protection than other forms of expression?

2. What are the evidentiary standards for determining a government's true "predominate purpose" when deciding whether a regulation is content-based or content-neutral under the First Amendment?

3. What is the meaning of the intermediate scrutiny test's "narrow tailoring" requirement in the context of regulations of sexually explicit, non-obscene speech?

4. May a trial court grant summary judgment to a government in a First Amendment challenge in the face of uncontroverted evidence that the regulation forecloses an entire unique medium of expression, as well as substantial evidence that the regulation's "predominate purpose" was the suppression of speech?

RULE 29.6 LISTING

DDF&S Investment Co. has no parent corporation, and no publicly held company owns ten percent or more of the corporation's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 LISTING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS THE WRIT SHOULD BE GRANTED	6
I. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE IMPORTANT BUT UNSETTLED QUESTIONS OF "WHAT IS THE APPROPRIATE LEVEL OF FIRST AMENDMENT PROTECTION FOR SEXUALLY EXPLICIT NON-OBSCENE SPEECH?" AND "WHAT IS THE STANDARD FOR MEASURING REGULATIONS THAT ABRIDGE SUCH SPEECH, ASSUMING IT IS ENTITLED TO LOWER PROTECTION THAN OTHER FORMS OF EXPRESSION?"	6
A. The Ninth Circuit Recognized the Law's Lack of Clarity on This Question	6
B. The Several Opinions in This Court's Decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), Have Resulted in Confusion in the Lower Courts	7
C. The Confusion Occasioned by *Barnes* Has Caused Courts to Ignore Other Decisions of This Court	9

TABLE OF CONTENTS – Continued

Page

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE IMPORTANT AND UNSETTLED QUESTION OF WHAT THE EVIDENTIARY STANDARDS ARE FOR DETERMINING THE GOVERNMENT'S TRUE "PREDOMINATE PURPOSE" WHEN DECIDING WHETHER A REGULATION IS CONTENT-BASED OR CONTENT-NEUTRAL UNDER THE FIRST AMENDMENT 12

A. The Ninth Circuit Recognized the Law's Lack of Clarity on This Question 12

B. This Court's Jurisprudence Leaves the Answer to This Question Unsettled 13

C. The Lower Federal Courts and State Courts of Last Resort Have Articulated Different Answers to This Question 17

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE UNSETTLED QUESTION OF THE MEANING OF THE INTERMEDIATE SCRUTINY TEST'S "NARROW TAILORING" REQUIREMENT IN THE CONTEXT OF REGULATIONS OF SEXUALLY EXPLICIT NON-OBSCENE SPEECH 21

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN THE FACE OF UNCONTROVERTED EVIDENCE THAT THE REGULATION FORECLOSED AN ENTIRE UNIQUE MEDIUM OF EXPRESSION, AS WELL AS SUBSTANTIAL EVIDENCE THAT THE PREDOMINATE PURPOSE OF THE REGULATION WAS THE SUPPRESSION OF SPEECH, CONFLICTS WITH DECISIONS OF THIS COURT 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Federal Cases

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 22, 23

Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858 (8th Cir. 1994) 18

Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981) 18

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 7, 8, 9, 10, 11, 24, 27

Board of Trustees v. Fox, 492 U.S. 469 (1989) 11, 23

Chesapeake and Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994), *vacated on other grounds*, 516 U.S. 415 (1996) 23

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 16

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 16

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 22, 23

City of Dallas v. Stanglin, 490 U.S. 19 (1989) 24

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 26, 29

City of Las Vegas v. Foley, 747 F.2d 1294 (9th Cir. 1984) 20

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) ..... *passim*

Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382 (6th Cir. 1996) 18

TABLE OF AUTHORITIES – Continued

Page

Cohen v. California, 403 U.S. 15 (1971) 30

DLS, Inc. v. City of Chattanooga, 107 F.3d 403 (6th Cir. 1997) 18

Edwards v. Aguillard, 482 U.S. 578 (1987) 16

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 9

Faraone v. City of East Providence, 935 F. Supp. 82 (D.R.I. 1996) 10

Farkas v. Miller, 151 F.3d 900 (8th Cir. 1998) 7, 8

Florida Bar v. Went-for-It, Inc., 515 U.S. 618 (1995) 22

Fraternal Order of Police Hobart Lodge #121, Inc. v. Hobart, 864 F.2d 551 (7th Cir. 1988) 18

Frisby v. Schultz, 487 U.S. 474 (1988) 27

Goldberg v. Whitman, 743 F. Supp. 943 (D. Conn. 1990) 19

Grosjean v. American Press Co., 297 U.S. 233 (1936) 16

Grossbaum v. Indianapolis-Marion County Bldg. Auth., 100 F.3d 1287 (7th Cir. 1996) 15

Hart Bookstores v. Edmiston, 612 F.2d 821 (4th Cir. 1979) 17

International Eateries of Am., Inc. v. Broward County, 941 F.3d 1157 (11th Cir. 1991) 7

J & B Entertainment, Inc. v. City of Jackson, 152 F.3d 362 (5th Cir. 1998) 7, 12, 13

J.L. Spoons, Inc. v. City of Brunswick, ___ F. Supp. 2d ___, No. 1:99CV0477, 1999 WL 322999 (N.D. Ohio May 20, 1999) 24

Jamison v. Texas, 318 U.S. 413 (1943) 26

TABLE OF AUTHORITIES – Continued

Page

Lovell v. City of Griffin, 303 U.S. 444 (1938) 26

MD II Entertainment, Inc. v. City of Dallas, 28 F.3d 492 (5th Cir. 1994) 10

Marks v. United States, 430 U.S. 188 (1977) 7, 9

Martin v. City of Struthers, 319 U.S. 141 (1943) 26

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 16

Miller v. Johnson, 515 U.S. 900 (1995) 16

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 16

N.W. Enterprises, Inc. v. City of Houston, 27 F. Supp. 2d 754 (S.D. Tex. 1998) 19

Nakatomi Invs. Inc. v. City of Schenectady, 949 F. Supp. 988 (N.D.N.Y. 1997) 7

National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 9

News Am. Publ'g., Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1984) 16

Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997) 10

Piece Meal Ltd. v. Village of Bellwood, No. 90 C 7131, 1991 WL 211292 (N.D. Ill. Oct. 10, 1991) 14, 18

Reno v. ACLU, 521 U.S. 844 (1997) 9, 10, 28

Richland Bookmart, Inc. v. Nichols, 137 F.3d 435 (6th Cir. 1998) 10

San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) 23

TABLE OF AUTHORITIES – Continued

Page

Schad v. Mount Ephraim, 452 U.S. 61 (1981) 26

Schneider v. State (Town of Irvington), 308 U.S. 147 (1939) 26

Schultz v. City of Cumberland, 26 F. Supp. 2d 1128 (W.D. Wis. 1998) 8

Somers Realty Corp. v. Harding, 886 F. Supp. 386 (S.D.N.Y. 1995) 19

Suburban Video, Inc. v. City of Delafield, 694 F. Supp. 585 (E.D. Wis. 1988) 18

Texas v. Johnson, 491 U.S. 397 (1989) 8

Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994) 7, 8

Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994) 17

Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997) 21, 22

United States v. Eichman, 496 U.S. 310 (1990) 17

United States v. Lovett, 328 U.S. 303 (1946) 16

United States v. O'Brien, 391 U.S. 367 (1968) ..... *passim*

University Books & Video, Inc. v. Metropolitan Dade County, 33 F. Supp. 2d 1364 (S.D. Fla. 1999) 10

Vandenplas v. City of Muskego, 753 F.2d 555 (7th Cir. 1985) 18

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 14, 21, 22

STATE CASES

Antonello v. City of San Diego, 93 Cal. Rptr. 820 (Cal. Ct. App. 1971) 19

Connor v. Town of Hilton Head Is., 442 S.E.2d 608 (S.C. 1994) 11

TABLE OF AUTHORITIES – Continued

Page

DCR, Inc. v. Pierce County, 964 P.2d 380 (Wash. App. 1998) 22, 28

Discotheque, Inc. v. City Council of Augusta, 449 S.E.2d 608 (Ga. 1994) 17

Georgia v. Cafe Erotica, Inc., 500 S.E.2d 574 (Ga. 1998) 10

Goldrush II v. City of Marietta, 482 S.E.2d 347 (Ga. 1997) 11, 19

Hamilton Amusement Ctr. v. Verniero, 716 A.2d 1137 (N.J. 1998) 10, 12

Ino Ino v. City of Bellevue, 936 P.2d 154 (Wash. 1997) 28

Pap's A.M. v. City of Erie, 719 A.2d 273 (Pa. 1998), *cert. granted* 119 S. Ct. 1753 (U.S. May 17, 1999) (No. 98-1161) 7, 11

T & D Video, Inc. v. City of Revere, 670 N.E.2d 162 (Mass. 1996) 12

Town of Islip v. Caviglia, 540 N.E.2d 215 (N.Y. 1989) 12, 13, 15, 19

STATUTES

28 U.S.C. § 1254(1) 1

Wash. Rev. Code § 9A.28.030 (1998) 24

Wash. Rev. Code § 9A.44.010(2) (1998) 27

Kent City Code Chapter 5.10 ..... 1, 3

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Alexander M. Bickel, *The Least Dangerous Branch* (1962) 17

Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297 (1997) 15

Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996) 6, 15

Erwin Chemerinsky, *Constitutional Law* (1997).....6, 13

Laurence Tribe, *American Constitutional Law* (2d ed. 1988)..... 6

Leon Friedman, *Purpose, Intent and Motive in Constitutional Litigation*, 596 Prac. L. Inst./Litig. 713 (1998)..... 15

Richard H. Fallon, Jr., *The Supreme Court, 1996 Term – Forward: Implementing the Constitution*, 111 Harv. L. Rev. 56 (1997) 14

Robert L. Stern et al., *Supreme Court Practice* (7th ed. 1993) 11

Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249 (1995)..... 10

PETITION FOR WRIT OF CERTIORARI

Petitioners Frank Colacurcio, Jr., David Ebert, and Steve Fueston, d/b/a DDF&S Investment Co. (collectively, "Colacurcio") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported at 163 F.3d 545 and can be found at Appendix A. The memorandum order of the district court granting Respondent's Motion for Summary Judgment is reported at 944 F. Supp. 1470 and appears at Appendix B. The Order of the court of appeals denying the petition for rehearing is unpublished and appears at Appendix C.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on December 8, 1998. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on March 26, 1999. This Petition is timely filed within ninety days of that date as provided in Supreme Court Rule 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves portions of the First Amendment to the United States Constitution, which in pertinent part provides as follows:

> Congress shall make no law . . . abridging the freedom of speech. . . .

This case also involves the City of Kent's Adult Entertainment Ordinance, Kent City Code ("KCC") Chapter 5.10, which in pertinent part states, "No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron." The entire ordinance appears at Appendix D.

STATEMENT OF THE CASE

Petitioners sought to open a non-alcoholic adult nightclub in the City of Kent, Washington, (the "City") that was to feature nude and semi-nude stage dancing and semi-nude table dancing.[1] A table dance is an erotic dance commonly performed in close proximity to the patron and is featured in many adult nightclubs throughout the United States. At the time, *nude* table dancing was prohibited, but table dancing with a full bikini was permitted.

Petitioners found a site for their nightclub, but the City refused to process the permit because the parcel had been incorrectly zoned for adult entertainment. Petitioners then challenged the constitutionality of the City's adult entertainment zoning ordinance in federal court. The district court ruled that the zoning ordinance violated the First Amendment because it permitted adult entertainment on only one site in the entire City of Kent. The parties then entered into a settlement agreement, which the district court approved on August 25, 1994. The settlement agreement required the City to treat Petitioners' proposed business activity as a lawful non-conforming use. *See* App. A at A-2 to A-4.

Immediately after the settlement agreement, the City Council declared a moratorium on adult business permits. Though the settlement precluded the City from applying the moratorium to Petitioners, the City Council simultaneously began consideration of amendments to its existing adult entertainment *regulatory* scheme. A mere six months after the successful challenge to the zoning ordinance, the City adopted amendments to the City Code that had the effect of imposing a *complete* ban on table dancing, including table dancing with a full bikini.

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[1] Though laws around the country have a variety of different definitions of "semi-nude," Petitioners use the term in this Petition to mean that female dancers would be wearing at least both halves of an opaque bikini.

As amended, Kent City Code ("KCC") § 5.10.110 A and § 5.10.120 A(2) require "[a]ll dancing and adult entertainment [to] occur" on "a stage or platform at least twenty-four (24) inches in elevation above the level of the patron seating areas." KCC § 5.10.120 A(3) provides as follows: "No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron." App. D at D-26 to D-28. Petitioners then filed a second action in the district court arguing that the complete ban on table dancing – in particular, the ten-foot distance requirement – violates the First Amendment. At the end of discovery, the City moved for summary judgment.

In opposition, Petitioners presented evidence demonstrating that the City's predominate purpose in enacting the amendments was to undermine the court-approved settlement and to prevent all adult entertainment businesses, including Petitioners', from locating in Kent. In addition to the fact that the amendments were passed soon after the settlement and in conjunction with a temporary moratorium on all adult businesses, Petitioners provided direct evidence of the City's true purpose: minutes of the City Council and the City Council's Planning Committee meetings showing that the Mayor and City Council members did not want to comply with the district court's decision invalidating the zoning ordinance. The official minutes of the City Council meeting on December 19, 1995, for example, state that "Mayor White . . . said that . . . he does not personally support adult entertainment businesses and *does not want any in Kent*" (emphasis added).

The minutes also reflect that the Council members and the City Attorney knew (1) that table dancing is the primary means by which adult nightclubs earn revenue, (2) that a ban on table dancing would pose an insurmountable economic obstacle to the opening of an adult nightclub, and (3) that the amendments to the regulatory ordinance would serve as an effective alternative to exclusionary zoning so as to bring about a complete ban on adult entertainment. For example, in one Planning Committee meeting, the City Attorney stated, "*Since we cannot zone these type of businesses out of the City*, the licensing was looked at that was in place for this type of

facility" (emphasis added). At his deposition, he then testified that he knew that the proposed amendments would have an adverse economic impact on the adult nightclubs. At a Planning Committee meeting on April 10, 1995, one of the Committee members stated, "Everybody's talking about this business license practice Ordinance that [the City Attorney has] written, and it's a beaut. And if it holds up, *nobody's going to want to come to this City*" (emphasis added). At the same meeting, the Chairman of the Committee stated: "With all the regulations we have adopted and stuff, I'm not too concerned that someone's going to come and try to open something up. *Because we've made it a little bit difficult for them to make money in the traditional way they make money*" (emphasis added). *See generally* App. E at ¶¶ 28-37.

Petitioners also presented uncontroverted expert evidence that table dancing is a unique medium of expression distinct from stage dancing, that it is performed throughout the United States, and that distance between patron and entertainer is an expressive component of the dance. Dr. Judith Hanna, a Senior Research Scholar at the University of Maryland, and the author of four books and eighty scholarly articles on the anthropology of dance, provided a declaration stating that requiring the dancers to maintain a ten-foot distance "directly and unmistakably affects the *content* of the erotic message sought to be conveyed by the performer." App. F at ¶ 23 (emphasis added). Petitioners also presented the declaration of Dr. Edward I. Donnerstein, chairman of the Communications Department at the University of California at Santa Barbara, and the lead social scientist called to give expert testimony before the Meese Commission on Pornography, who conducted an original study of the impact of entertainer-patron separation on audience perception of erotic dance performance. The study demonstrated that distance between entertainer and performer constitutes an expressive component of the dance. App. G.

Petitioners also presented evidence of their attempt to open an adult nightclub in Bellevue, Washington, similar to the one proposed for Kent. Bellevue had adopted an ordinance requiring entertainers to perform four feet from the nearest

patron. Petitioners attempted to comply with the Bellevue Ordinance but were forced to close their business because, without table dancing, the business could not generate sufficient revenue to cover expenses. Petitioners presented evidence that the impact of the four-foot rule in Bellevue, and a similar restriction in the City of Federal Way, Washington, was to reduce substantially both the number of entertainers willing to work in the nightclub and the number of patrons willing to attend the performances. Kent's ban on table dancing, together with Petitioners' experience in Bellevue and the experience of another club in Federal Way, led them to decide not to exercise their option to purchase the parcel in Kent. *See* App. A at A-23.

The district court held that Petitioners' submissions failed to raise a genuine issue of material fact and granted the City's Motion for Summary Judgment, finding the Ordinance to be content-neutral and valid under the intermediate scrutiny test. App. B.

A divided panel of the Ninth Circuit affirmed. App. A. The court of appeals held that the ten-foot rule was content-neutral because the ordinance's purpose was to "ameliorate secondary effects," *id.* at A-11, and was therefore "justified without reference to speech," *id.* at A-13 to A-14. Applying the intermediate scrutiny test, the court held that "the ten-foot distance requirement is narrowly tailored and leaves open ample alternative avenues for communication of protected expression." *Id.* at A-25. Judge Reinhardt dissented, concluding that Petitioners had raised a genuine issue of material fact as to whether the regulation was content-neutral by providing evidence that "stage dancers and table dancers communicate different expressive content in their respective messages" and, therefore, that "proximity itself – the distance, or lack thereof, between the dancer and the patron – is integral to the message conveyed by table dancing." *Id.* at A-27 (Reinhardt, J., dissenting). Petitioners then sought rehearing and rehearing *en banc*, and both requests were denied. App. C.

REASONS THE WRIT SHOULD BE GRANTED

This Petition should be granted because the Ninth Circuit's opinion conflicts with decisions of this Court and other courts of appeals, and raises important and unsettled questions of First Amendment doctrine, both in general and as the First Amendment relates to sexually explicit, non-obscene expression.

I. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE IMPORTANT BUT UNSETTLED QUESTIONS OF "WHAT IS THE APPROPRIATE LEVEL OF FIRST AMENDMENT PROTECTION FOR SEXUALLY EXPLICIT NON-OBSCENE SPEECH?" AND "WHAT IS THE STANDARD FOR MEASURING REGULATIONS THAT ABRIDGE SUCH SPEECH, ASSUMING IT IS ENTITLED TO LOWER PROTECTION THAN OTHER FORMS OF EXPRESSION?"

A. The Ninth Circuit Recognized the Law's Lack of Clarity on This Question.

The Ninth Circuit recognized, as have many courts in recent years, that the standard of review applicable to government restriction of sexually explicit, non-obscene expression remains unclear: "The fragmented nature of Supreme Court opinions dealing with nude dancing in particular and sexually explicit but non-obscene conduct in general has resulted in a lack of clear guidance on the level of First Amendment protection afforded to this type of expression." App. A at A-5; *see also* Laurence Tribe, *American Constitutional Law* § 12-18, at 938 (2d ed. 1988) ("[N]o Court has yet squarely held that offensive or sexually explicit but non-obscene speech enjoys less than full first amendment protection."); *cf.* Erwin Chemerinsky, *Constitutional Law* § 11.3.4.4 (1997) (referring to sexual speech as "protected, but low value"); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 473 n.162 (1996) ("[S]exually explicit

speech [other than obscenity and child pornography] is entitled to less than a full measure of constitutional protection, although the precise standard is uncertain.").

B. The Several Opinions in This Court's Decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), Have Resulted in Confusion in the Lower Courts.

This Court's 5-4 decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), contains four separate opinions. Under the "narrowest grounds" rule for determining the holding of a case with no majority opinion, *see Marks v. United States*, 430 U.S. 188, 193 (1977), different lower courts have gleaned different holdings from *Barnes*. Other than concluding that the statute at issue in *Barnes* is constitutional,[2] there is little else on which courts agree about the case's holding. As one court put it, "the *Marks* rule is less useful where, as [in *Barnes*], no opinion, however narrowly construed, may be said to embody a position that enjoys the support of at least five Justices who concurred in the judgment." *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994).

Most courts treat Justice Souter's concurring opinion in *Barnes*, in which he upholds Indiana's public indecency statute as a valid regulation of secondary effects, as controlling authority. *See, e.g., J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998); *Farkas v. Miller*, 151 F.3d 900, 904 (8th Cir. 1998); *Triplett Grille*, 40 F.3d at 134-35; *International Eateries of Am., Inc. v. Broward County*, 941 F.3d 1157, 1160-61 (11th Cir. 1991). Some courts, however, have adopted the principal opinion authored by the Chief Justice as controlling. *See Nakatomi Invs., Inc. v. City of Schenectady*, 949 F. Supp. 988, 998 (N.D.N.Y. 1997). At least one court has even found the *Barnes* decision to be so fractured that it followed the dissent. *See Pap's A.M. v. City of*

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[2] Indeed, one court has even questioned this. *See Pap's A.M. v. City of Erie*, 719 A.2d 273, 278-79 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (U.S. May 17, 1999) (No. 98-1161).

Erie, 719 A.2d 273, 279-80 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (U.S. May 17, 1999) (No. 98-1161).

It appears that a number of courts have followed Justice Souter's opinion in part because they have misread Justice Scalia's concurrence in *Barnes*. Courts have assumed that the fact that Justice Scalia was unwilling to subject Indiana's public indecency statute to any First Amendment scrutiny at all means that he believed that nude dancing was not entitled to First Amendment protection. *See Farkas*, 151 F.3d at 904 (referring to the "major premise" of Justice Scalia's opinion as being "that nude dancing is not an expressive activity that warrants constitutional protection"); *Triplett Grille*, 40 F.3d at 133 ("Justice Scalia . . . concluded that nude dancing is not inherently expressive activity entitled to First Amendment protection."). This is a misreading of his opinion. *See Schultz v. City of Cumberland*, 26 F. Supp. 2d 1128, 1140-41 (W.D. Wis. 1998). Justice Scalia's opinion in *Barnes* explicitly left open the question whether nude dancing was sufficiently expressive to warrant First Amendment protection. *See Barnes*, 501 U.S. at 577 n.4 (Scalia, J., concurring in the judgment). Moreover, his opinion clearly rested solely on the fact that the law in question was a law of general applicability, not one aimed at expression. Indeed, he made eminently clear that "[w]here the government prohibits conduct precisely because of its communicative attributes," the Court should hold, and consistently has held, the regulation to be unconstitutional.[3] *Id.* at 577. These quotations are in keeping with his view that even the most objectionable expressive conduct is entitled to First Amendment protection. *See Texas v. Johnson*, 491 U.S. 397 (1989) (Justice Scalia joining majority). Indeed, the fact that Justice Scalia concurred in the

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[3] In fact, he even stated that a law of general applicability could be subjected to First Amendment scrutiny if the facts were to warrant: "Were it the case that Indiana in practice targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools . . . , it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct." *Id.* at 574.

majority opinion in *Reno v. ACLU*, 521 U.S. 844 (1997), suggests that he is not inclined to characterize non-obscene speech as "low-value" simply because it is sexually explicit. *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 253 (1990) (Scalia, J., concurring in part and dissenting in part) ("It is necessary, to be sure of protecting valuable speech, that we compel all communities to tolerate individual works that have only marginal communicative content beyond raw sexual appeal."). *But see id.* (expressing view that adult business licensing scheme not subject to First Amendment scrutiny).

In any event, even assuming Justice Souter's concurrence in *Barnes* to be law under *Marks*, such a view still leaves uncertain the level of protection afforded sexually explicit speech where, as here, the law is directly aimed at a particular mode of expression and is thus content-based. In these circumstances, Justice Souter has consistently adhered to the view that such restrictions be subjected to the strictest scrutiny, even where sexually explicit speech is at issue. *See National Endowment for the Arts v. Finley*, 524 U.S. 569, ___, 118 S. Ct. 2168, 2185-96 (1998) (Souter, J., dissenting); *Reno v. ACLU*, 521 U.S. 844 (1997) (Justice Souter joining majority). Where a regulation, such as the ten-foot distance rule in question here, is directly aimed at a particular mode of expression, *Barnes* is less instructive on this fundamental preliminary question. No matter how one reads *Barnes*, therefore, the law regarding the level of protection to be afforded sexually explicit non-obscene expression remains unclear.

C. The Confusion Occasioned by *Barnes* Has Caused Courts to Ignore Other Decisions of This Court.

As a result of the lack of clear guidance on the level of protection afforded such speech, some courts have concluded that laws aimed at adult entertainment are automatically considered content-neutral even if content-based on their face and in their effects. Most courts have relied for this proposition on Justice Souter's opinion in *Barnes* and this Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Yet, *Renton* requires courts to make findings of

secondary effects before concluding that a regulation aimed specifically at adult entertainment is "content-neutral." Moreover, this Court's more recent decision in *Reno v. ACLU*, 521 U.S. 844, ___, 117 S. Ct. 2329, 2342-43 (1997), makes clear that restrictions on sexually explicit non-obscene speech can be content-based. Yet, because of the confusion occasioned by the fractured nature of *Barnes*, some courts have in effect read *Renton* to mean that regulations on the adult entertainment business are automatically "content-neutral." *See, e.g., University Books & Video, Inc. v. Metropolitan Dade County*, 33 F. Supp. 2d 1364, 1369 (S.D. Fla. 1999) (citing *Renton* for proposition that zoning regulations that distinguish between uses that are sexually explicit and those that are not are content-neutral); *Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137, 1143 (N.J. 1998) (concluding that statute restricting advertising by sexually oriented businesses was content-neutral without any evidence of secondary effects)[4], *petition for cert. filed*, 67 U.S.L.W. 3459 (Jan. 5, 1999) (No. 98-1089); *see also Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998) (listing cases); *cf. id.* ("a kind of legal fiction has been created that calls regulation of such literature 'content neutral' when what is meant is only that the regulation is constitutionally valid"); Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1265-67 (1995).

In contrast, other courts have held that *Renton* does not eliminate a court's duty to inquire into whether the government has made the findings necessary to establish that its law really was aimed at secondary effects: *Phillips v. Borough of Keyport*, 107 F.3d 164, 175 (3d Cir. 1997) (*en banc*); *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 494 (5th Cir. 1994); *Faraone v. City of East Providence*, 935 F. Supp. 82, 88 (D.R.I. 1996); *Georgia v. Cafe Erotica, Inc.*, 500

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[4] *See id.* at 1152-53 (Stein, J., dissenting) (noting the majority's "wink[ing] at the complete lack of legislative findings supporting" the ordinance); *id.* at 1157 (Stein, J., dissenting).

S.E.2d 574, 575-76 (Ga. 1998); *Goldrush II v. City of Marietta*, 482 S.E.2d 347, 355 n.9 (Ga. 1997); *Pap's A.M. v. City of Erie*, 719 A.2d 273, 279-80 (Pa. 1998); *Connor v. Town of Hilton Head Is.*, 442 S.E.2d 608, 609-10 (S.C. 1994).

In this case, the Ninth Circuit implied that sexually explicit live entertainment is "low value" speech and thus entitled to less protection, *see* App. A at A-26 (Reinhardt, J., dissenting), but left open the question of which *Barnes* opinion is controlling. It is clear from the opinion, however, that the fact that the message involved erotic expression affected the court's analysis.

Even if the Ninth Circuit panel is correct that non-obscene, sexually explicit speech is entitled to a lower level of protection than other expression, this Court should grant certiorari to decide what standards apply. For example, is the standard for judging regulations that abridge sexually oriented expression the one announced in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), or that stated in *Renton*? Are the *O'Brien* and *Renton* standards the same, or do they differ in the amount of protection they provide? Finally, is the standard for sexually oriented non-obscene expression identical to or different from the one for regulations that abridge commercial speech? *See Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) ("commercial speech" test is "substantially similar" to test for time, place, and manner restrictions). The lack of uniformity has caused the lower courts to apply a host of different standards and has made it difficult if not impossible for local governments and adult entertainment businesses to determine the extent of First Amendment protection.

Finally, this unsettled question is important as evidenced not only by the number of different courts that have addressed it, but also by the fact that this Court has already granted certiorari to decide a related question in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (U.S. May 17, 1999) (No. 98-1161). *See* Robert L. Stern et al., *Supreme Court Practice* § 4.16, at 192-93 (7th ed. 1993).

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE IMPORTANT AND UNSETTLED QUESTION OF WHAT THE EVIDENTIARY STANDARDS ARE FOR DETERMINING THE GOVERNMENT'S TRUE "PREDOMINATE PURPOSE" WHEN DECIDING WHETHER A REGULATION IS CONTENT-BASED OR CONTENT-NEUTRAL UNDER THE FIRST AMENDMENT[5]

A. The Ninth Circuit Recognized the Law's Lack of Clarity on This Question.

Once again, on an important and determinative question of federal constitutional law, the Ninth Circuit recognized that

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[5] This question necessarily encompasses two analytically distinct, but related, questions: (1) how much evidence of secondary effects does the government need to produce to meet its initial burden to justify its regulation of speech as content-neutral; and (2) assuming the government has submitted sufficient evidence to meet its initial burden, how much evidence must the plaintiff introduce to raise a genuine issue of material fact as to the government's true predominate purpose. Although Petitioners focus on the second of these two questions, this case implicates the first as well. The federal courts of appeals and the state courts of last resort have used different standards in determining whether the government has introduced enough evidence to meet its initial burden to show its predominant purpose is non-speech related. *Compare, e.g., Town of Islip v. Caviglia*, 540 N.E.2d 215, 218-20 (N.Y. 1989) (secondary effects shown by study even though no direct proof), *and Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137, 1143 (N.J. 1998) (concluding that statute restricting advertising by sexually oriented businesses was content-neutral without any evidence of secondary effects), *petition for cert. filed*, 67 U.S.L.W. 3459 (U.S. Jan. 5, 1999) (No. 98-1089), *with, e.g., T & D Video, Inc. v. City of Revere*, 670 N.E.2d 162, 165-66 (Mass. 1996) (evidence relevant only if actually considered by legislators in enacting the ordinance; post hoc rationalizations during litigation not permitted), *and J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 374 (5th Cir. 1998) (language in preamble along with studies from the passage of a previous ordinance three years earlier insufficient to meet government burden).

it could have benefited from this Court's guidance: "The case law has not clarified when secondary effects warrant restriction of speech and how much proof there must be of these effects. Precedent provides no standards for determining when an illicit but inconsequential 'motivating factor' might develop into an illicit and controlling 'predominant purpose.' " App. A at A-10 (citing Erwin Chemerinsky, *Constitutional Law* § 11.3.4.4, at 840 (1997)); *see also Town of Islip v. Caviglia*, 540 N.E.2d 215, 219 n.2 (N.Y. 1989) (noting that "there is a constitutionally significant distinction between an improper motivating factor and an unconstitutional predominant purpose" without explaining how one distinguishes between the two).

B. This Court's Jurisprudence Leaves the Answer to This Question Unsettled.[6]

It is considered black-letter law that "this Court will not strike down an otherwise constitutional statute on the basis of

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The Fifth Circuit's unanimous opinion in *J & B Entertainment* provides a perfect example of a direct conflict with the divided Ninth Circuit decision below. In *J & B Entertainment*, the Fifth Circuit addressed the constitutionality of a 1994 ordinance banning public nudity under the "secondary effects" approach announced by Justice Souter in *Barnes*. In so doing, the court refused to accept as relevant a study done by the city prior to a 1991 zoning ordinance even though there had been no change in the make-up of the City Council in the intervening period. Here, in contrast, not only did the Ninth Circuit consider a study to be relevant when that study contained no evidence of a link between the 10-foot rule and the secondary effects, but it also ignored the fact that the study on which the City of Kent purportedly relied was conducted in 1982, prior to the promulgation of an earlier regulatory scheme and 13 years before the passage of the challenged legislation.

[6] It should be made clear that the facts Petitioners introduced in opposition to the summary judgment motion constituted not only evidence of the intent of individual legislators based on what they said, but also objective facts surrounding the passage of the Ordinance and its actual effect. Thus, the open question here is "when do objective indicators that

an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). The clear import of *O'Brien* is that with respect to the First Amendment's Free Speech Clause the "purpose of . . . legislation [is] irrelevant." *Id.* at 385. This general principle, however, is open to much fine-tuning. As put by one court, "Despite the resoluteness with which this 'familiar principal of constitutional law' is typically invoked, courts remain unclear in the strict application of the principle, particularly in the context of First Amendment cases." *Piece Meal Ltd. v. Village of Bellwood*, No. 90 C 7131, 1991 WL 211292, at *7-8 (N.D. Ill. Oct. 10, 1991) (quoting *O'Brien*, 391 U.S. at 383).

The confusion has become more pronounced in recent years because *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), necessarily modified the general rule to some extent by permitting content-neutral analysis of an ordinance that on its face "treat[ed] theaters that specialize in [one type of speech] differently from other kinds of theaters," *id.* at 47, as long as the law was "*justified* without reference to the content of the regulated speech," *id.* at 48 (citation and internal quotations omitted) (emphasis in *Renton*). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The government's purpose is controlling."). In determining whether a regulation is content-neutral or content-based, *Renton* and *Ward* thus ask courts to inquire as to the government's "predominate intent."[7] *Renton*, 475 U.S. at 47. There

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suggest that the government's true purpose is different from the purpose it articulated, combined with evidence that legislators subjectively sought a different purpose, give rise to a factual dispute about the government's true purpose?"

[7] For purposes of the present Petition, Petitioners make no distinction between "purpose," "motive," and "intent." *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term – Forward: Implementing the Constitution*, 111 Harv. L. Rev. 56, 71 (1997) ("In . . . the simplest and most familiar usage,

can thus be no question that, under *Renton*, government purpose is the central inquiry in determining whether a law is content-based or content-neutral. *See Town of Islip v. Caviglia*, 540 N.E.2d 215, 219 n.2 (N.Y. 1989) (holding that "*Renton* requires an examination of a municipality's motive in enacting the ordinance before examining whether the ordinance is . . . valid"); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297, 316 (1997) ("The Court's recent free speech jurisprudence . . . contains an increased . . . attention to government purpose . . . especially . . . in the Court's 'content' jurisprudence.").

This raises the question of how to square *Renton*'s insistence that the central focus be the government's predominate purpose with *O'Brien*'s categorical statement that the "purpose of . . . legislation [is] irrelevant." Most courts, including the Ninth Circuit below, assume that in spite of *O'Brien*'s language, *Renton* requires courts to determine the legislature's predominant intent. In other words, the broader principle embodied in *O'Brien*, that the purpose of legislation is irrelevant, is "hyperbole." *See Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1292 (7th Cir. 1996).

In the inquiry about the government's predominant intent, one thing is clear: When First Amendment free speech

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purpose is roughly coextensive with motive."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 426 n.40 (1997) (noting that this Court has used the terms interchangeably in First Amendment jurisprudence and elsewhere and citing *O'Brien* as one example of this Court treating the terms "motive" and "purpose" as synonymous). This, of course, does not preclude distinctions between these words in other contexts such as, for example, criminal law. So, a "burglar may *intend* to break into a house for the *purpose* of stealing a painting with the *motive* of getting enough money for his family." Leon Friedman, *Purpose, Intent and Motive in Constitutional Litigation*, 596 Prac. L. Inst./Litig. 713, 715 (1998) (emphases added).

rights are at stake,[8] courts must look beyond the government's articulated justification when determining whether a law is "content-neutral." *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (asking whether a law "was *designed* to suppress certain ideas that the City finds distasteful") (emphasis added); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579-80 (1983) (interpreting *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), as permitting inquiry into motive of legislature); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion) ("Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason *must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose.*") (emphasis added); *see also News Am. Publ'g., Inc. v. FCC*, 844 F.2d 800, 809-10 (D.C. Cir. 1984) (citing *Minneapolis Star & Tribune* for the proposition that "[t]he Supreme Court has recently hinted at a readiness to infer censorial intent

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[8] Determining the government's purpose in passing legislation is important not only in free speech cases, but also in other contexts. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (voting district violates Equal Protection Clause if race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (Establishment Clause violation where legislature's "actual purpose" is to promote religion); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-42 (1993) (opinion of Kennedy, J., joined by Stevens, J.) (inquiry into subjective intent of legislators permitted in Establishment Clause challenge); *United States v. Lovett*, 328 U.S. 303, 313-14 (1946) (law violates Bill of Attainder Clause if its "purpose" was to punish particular individuals).

Though the general question may be the same, different concerns may be implicated by different constitutional provisions. While Petitioners restrict their analysis in this Petition to challenges to government regulations pursuant to the Free Speech Clause, Petitioners do not thereby mean to imply that jurisprudence on the question of government purpose in other contexts is irrelevant.

from legislative history and to invalidate laws so motivated"); *Discotheque, Inc. v. City Council of Augusta*, 449 S.E.2d 608, 609 (Ga. 1994) (referring to ordinance's preamble as "merely self-serving conclusory hearsay" insufficient to sustain the government's burden). This principle applies even if the statute is content-neutral on its face. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 645-46 (1994) ("[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys.") (citing *United States v. Eichman*, 496 U.S. 310, 315 (1990)).

C. The Lower Federal Courts and State Courts of Last Resort Have Articulated Different Answers to This Question.

Lower courts have answered this question in different ways because this Court has never articulated a standard by which to judge how to determine the government's predominate purpose when a statute's challenger raises substantial evidence suggesting that the government's alleged predominant purpose is not its true predominant purpose.

The Fourth Circuit has read *O'Brien* in the way most deferential to the government, deferring to the government as long as a content-neutral governmental interest can be "identifi[ed]." *See Hart Bookstores v. Edmiston*, 612 F.2d 821, 829 (4th Cir. 1979) ("The relevant question under *O'Brien* is not whether the perceived 'legislative motive' for legislation is unrelated to the suppression of free expression, but whether an identifiable 'governmental interest' is so unrelated."); *see also* Alexander M. Bickel, *The Least Dangerous Branch* 209 (1962) ("[A] determination of 'purpose' . . . is either the name given to the Court's objective assessment of the effect of a statute or a conclusionary term denoting the Court's independent judgment of the constitutionally allowable end that the legislature could have had in view."). The Sixth, Seventh, and Eighth Circuits all permit a more contextual inquiry into governmental purpose than the Fourth, but each of these three

courts arguably has internal conflicts on this question. *Compare Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 386-88 (6th Cir. 1996) (since content-neutral rationale was "voiced in the record and appears in the legislation itself," law is content-neutral), *with DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir. 1997) ("if the ordinance was intended to destroy the market for adult cabarets, it might run afoul of the First Amendment"); *compare Fraternal Order of Police Hobart Lodge #121, Inc. v. Hobart*, 864 F.2d 551, 554 (7th Cir. 1988) (Posner, J.) (noting that *O'Brien* principle "survives undiminished in cases . . . where the statute or ordinance does not single out particular individuals or groups for benefits or burdens and is not challenged as discriminating on invidious grounds such as race, religion, and sex"), *with Vandenplas v. City of Muskego*, 753 F.2d 555, 560 (7th Cir. 1985) ("In a case where facts implicating the First Amendment were properly alleged, the motives of the members of the town council . . . would presumably be relevant.");[9] *compare Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 861, 863-64 (8th Cir. 1994) (zoning restrictions on adult businesses upheld despite evidence of improper motive and despite the fact that trial judge found "that the city's predominant intent was to hinder or alleviate the operation of . . . adult businesses because of their content"), *with Avalon Cinema Corp. v. Thompson*, 667 F.2d

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[9] Though neither of these Seventh Circuit cases involved a determination of whether a law is content-neutral, both involved allegations that a statute violated the Free Speech Clause because of improper motives on the part of the legislature. In directly addressing the question whether a law is content-neutral, district courts in the Seventh Circuit have rendered arguably conflicting decisions. *Compare Piece Meal Ltd. v. Village of Bellwood*, No. 90 C 7131, 1991 WL 211292, at *8 (N.D. Ill. Oct. 10, 1991) (denying government motion for summary judgment on constitutionality of zoning ordinance partly on basis of evidence that city officials campaigned for two years to prevent plaintiffs from opening adult bookstore), *with Suburban Video, Inc. v. City of Delafield*, 694 F. Supp. 585, 589 (E.D. Wis. 1988) (no inquiry into city council members' real purpose as long as ordinance stated a valid purpose on its face).

659, 662-63 (8th Cir. 1981) (invalidating adult business zoning ordinance partly because it was passed with the goal of preventing the opening of an adult movie theater and bookstore).

Though Petitioners have not found any Second Circuit cases directly addressing the issue, trial courts in the Second Circuit have interpreted *O'Brien* as permitting "objective evidence of intent." *See Goldberg v. Whitman*, 743 F. Supp. 943, 954 (D. Conn. 1990); *see also Somers Realty Corp. v. Harding*, 886 F. Supp. 386, 390-92 (S.D.N.Y. 1995) (while "not go[ing] so far as to hold that no plaintiff could ever establish a First Amendment violation by demonstrating illicit legislative intent," finding insufficient evidence in that case). Though the Fifth Circuit appears likewise not to have addressed this issue directly, a federal district court in Texas has held a regulation of adult businesses to be content-based on the basis of improper motives, striking the law down as a result. *See N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp. 2d 754, 809-12 (S.D. Tex. 1998) (invalidating requirement that distance between adult businesses and protected uses, such as churches and schools, be at least 1500 feet partly on basis of evidence that city council members made statements during council meetings expressing their desire to close down sexually oriented businesses and that they knew that the distance requirement would effectively accomplish that goal). This decision obviously directly conflicts with those courts that preclude all inquiry into legislative motive or those that limit the inquiry to "objective evidence of intent."

State courts have likewise been faced with this question and have answered it in a variety of ways. *See Goldrush II v. City of Marietta*, 482 S.E.2d 347, 356 (Ga. 1997) (evidence that mayor and several council members sought to eliminate nude dancing establishments altogether was insufficient as a matter of law to establish improper intent); *Town of Islip v. Caviglia*, 540 N.E.2d 215, 219 n.2 (N.Y. 1989) (holding that "*Renton* requires an examination of a municipality's motive in enacting the ordinance before examining whether the ordinance is . . . valid"); *Antonello v. City of San Diego*, 93 Cal.

Rptr. 820, 822 (Cal. Ct. App. 1971) ("Where the purpose of a statute is relevant to a determination of its constitutional validity a court, to ascertain such purpose, may examine its immediate objective and ultimate effect as well as events leading up to its passage.").

With respect to the case below, the Ninth Circuit relied on an earlier Ninth Circuit decision, *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984), in determining the standards to be applied. In *Foley*, the Ninth Circuit stated, "The relevant governmental interest is determined by objective indicators as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings." *Id.* at 1297. In the case below, however, the Ninth Circuit interpreted *Foley* as permitting inquiry only as to whether the procedural handling of the Ordinance's promulgation was unusual. It then concluded that, because "the record does not indicate unusual procedural maneuvering on the part of the . . . City governing bodies[,] . . . [o]bjective indicators of illicit purpose are not present here." *See* App. A at A-12.

In so concluding, however, the court effectively ignored the many objective indicators plaintiffs introduced to demonstrate that the government's alleged purpose was in fact a sham: (1) the fact that the City's consideration of the regulatory amendments resulting in the ten-foot rule began immediately after the district court's decision that the City's zoning ordinance was unconstitutional; (2) the fact that the City simultaneously imposed a complete moratorium on all other adult business uses; (3) evidence that City officials sought ways to circumvent the district court's decision; and (4) evidence that City officials knew that table dancing was the primary means by which adult nightclubs earn revenue and that a complete ban would pose an insurmountable economic obstacle to the opening of an adult nightclub.

Rather than grapple with whether this evidence rises to the level necessary to undermine the government's alleged

predominant purpose, the Court below concluded that because "Kent's ordinance was based on a comprehensive study of adult entertainment businesses and their secondary impacts," and because "[t]he record also includes affidavits . . . documenting the connection between table dancing and illegal sexual activity," Petitioners' evidence was irrelevant. In effect, the Ninth Circuit read *Renton* to mean that as long as the government can point to a study about secondary effects and a supporting affidavit – that is, as long as it can come up with *some* evidence of a content-neutral justification – a challenger can *never* rebut the government's claim, no matter how much evidence the challenger provides. While Petitioners recognize the lack of clarity in the law, the Ninth Circuit's decision in the case below is manifestly mistaken. By insulating legislatures completely when they simply point to minimal evidence, this holding will threaten the basic principles embodied in this Court's First Amendment jurisprudence, that a government may not adopt a regulation of speech "because of disagreement with the message it conveys."

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE UNSETTLED QUESTION OF THE MEANING OF THE INTERMEDIATE SCRUTINY TEST'S "NARROW TAILORING" REQUIREMENT IN THE CONTEXT OF REGULATIONS OF SEXUALLY EXPLICIT NON-OBSCENE SPEECH

Assuming the City's ten-foot rule should be subjected to the intermediate scrutiny test as a content-neutral time, place, and manner regulation, the City had the burden to show that the rule was "narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). "Under intermediate scrutiny, the Government may employ the means of its choosing so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and does not burden substantially more speech than is necessary to further that interest." *Turner Broad. Sys.*

v. FCC, 520 U.S. 180, 213-14 (1997).[10] While laws subject to intermediate scrutiny "are not invalid simply because there is some imaginable alternative that might be less burdensome on speech," *id.* at 217 (citation and internal quotation marks omitted), the fact that the words "narrow tailoring" are used necessarily implies that courts must consider less speech-restrictive alternatives when determining whether the test is satisfied. *See id.* at 218-23 (considering less restrictive alternatives). Indeed, the test as articulated in *O'Brien* makes it perfectly clear that less speech-restrictive alternatives are relevant. *See O'Brien*, 391 U.S. at 377 (government must show "the incidental restriction on alleged First Amendment freedoms is *no greater than is essential* to the furtherance of that interest") (emphasis added).

This Court's "commercial speech" cases have a similar "narrow tailoring" test, placing on the government the "burden to establish a 'reasonable fit' between its legitimate interest . . . [and] the means chosen to serve those interests." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993); *see also Florida Bar v. Went-for-It, Inc.*, 515 U.S. 618, 632 (1995). The "regulation must indicate a 'carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition.' The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring in the judgment) (quoting *Discovery Network*, 507 U.S. at 417) (alteration in *44 Liquormart*); *see id.* at 524

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[10] Because of the way in which this principle is stated in *Ward*, courts often ignore the second half of the test and consider a law to be "narrowly tailored" when the law merely "promotes a substantial government interest that would be achieved less effectively absent the ordinance." *DCR, Inc. v. Pierce County*, 964 P.2d 380, 391 (Wash. App. 1998) (citing *Ward*, 491 U.S. at 799). Of course, that part of the "narrow tailoring" prong is little more than a reformulation of the "furthering the government interest" prong.

(Thomas, J., concurring in the judgment) (describing the principal and concurring opinions, which together were joined by seven Justices, as "commit[ing] courts to striking down restrictions whenever a direct regulation (i.e. a regulation involving no restriction on speech regarding lawful activity at all) would be an equally effective method" of achieving the government's goal).

The question thus arises as to whether the standards articulated in *Discovery Network* and *44 Liquormart* apply when the intermediate scrutiny test is used in the context of non-obscene, sexually explicit speech. At least one court has held that the "reasonable fit" commercial speech standard applies with equal force to the intermediate scrutiny test. *See Chesapeake and Potomac Tel. Co. v. United States*, 42 F.3d 181, 199 n.29 (4th Cir. 1994), *vacated on other grounds*, 516 U.S. 415 (1996). Given that "commercial speech receives less First Amendment protection than does non-commercial speech," *id.* (citing *Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989)), the "narrow tailoring" requirement of commercial speech cases should properly apply. Though this Court has explicitly stated that "the application of the [commercial speech] test [is] 'substantially similar' to the application of the test for validity of time, place, and manner restrictions upon protected speech," *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (quoting *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987)), it has never applied the "reasonable fit" test to a "content-neutral" regulation under the *O'Brien* test. Lower courts are thus unsure about the standards to apply and, in the case of sexually explicit speech, have universally ignored the *Discovery Network/44 Liquormart* language.

In the case below, the Ninth Circuit refused to consider seriously the most obvious "less burdensome alternative[ ] to reach the [government's] stated goal," *44 Liquormart, Inc.*, 517 U.S. at 529 (1996) (O'Connor, J., concurring in the judgment), a "no touch" rule. Such a rule would prohibit physical contact between the dancers and patrons and would thus be a "direct regulation," *44 Liquormart*, 517 U.S. at 524 (Thomas, J., concurring), for achieving the City's goal. *See*

also J.L. Spoons, Inc. v. City of Brunswick, ___ F. Supp. 2d ___, ___, No. 1:99CV0477, 1999 WL 322999, at *9-10 (N.D. Ohio May 20, 1999). Indeed, the way in which the Ninth Circuit casually dismissed Petitioners' argument is instructive, as it provides further evidence of the City's true goal: to prevent communication. The "no touch" rule, the Ninth Circuit concluded, was not a reasonable alternative to a complete ban on table dancing because it "*would permit verbal communication between dancers and patrons*, thereby failing to curtail propositions for drugs or sex." App. A at A-17 (emphasis added). While certainly a government can, and many do, prohibit criminal solicitation, *see, e.g.*, Wash. Rev. Code § 9A.28.030 (1998), requiring persons who wish to converse with each other to remain ten feet apart because they *might* engage in solicitation raises serious First Amendment overbreadth problems independent of the questions this Petition raises as to the Ordinance's complete ban on table dancing.

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN THE FACE OF UNCONTROVERTED EVIDENCE THAT THE REGULATION FORECLOSED AN ENTIRE UNIQUE MEDIUM OF EXPRESSION, AS WELL AS SUBSTANTIAL EVIDENCE THAT THE PREDOMINATE PURPOSE OF THE REGULATION WAS THE SUPPRESSION OF SPEECH, CONFLICTS WITH DECISIONS OF THIS COURT

It is settled law that dance is protected First Amendment activity.[11] So too are nude and semi-nude dancing. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Presumably,

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[11] Some forms of dance, however, lack the necessary communicative attributes to merit First Amendment protection. *See City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (social dancing not "expressive association" protected by the First Amendment).

ballet, tap, jazz, and modern dance would likewise each be entitled to First Amendment protection, such that a law completely banning, for example, tap dancing while leaving other forms of dance unaffected would be treated as content-based. Similarly, a law that, rather than explicitly prohibiting tap dancing, instead banned dancing with shoes that have metal soles could also be treated as content-based, because such a law would have the effect of imposing a complete ban on tap while leaving ballet, jazz, and most other types of dance unaffected.[12]

The question Petitioners sought answered below was whether table dancing likewise merits separate protection, just as do ballet and tap. The government introduced no evidence on the question. Petitioners, in contrast, introduced two expert affidavits, as well as a detailed scientific study. This uncontroverted evidence established that table dancing is in fact a unique medium of expression, distinct from stage dancing. According to Dr. Hanna's declaration, "the table dancer focuses on an individual audience member . . . to send *a personal message not manifestly intended for the audience as a whole*." App. F. at ¶ 16 (emphasis in original). Such a message makes the individual customer feel "special" and "important." *Id.* In contrast, "[s]tage dances . . . are dances performed on stage for the audience as a whole." *Id.* at ¶ 18. The message conveyed is one of "coldness and impersonality" because "[o]n-stage the dancer is viewed on a pedestal and [is] inaccessible." *Id.*

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[12] Naturally, it may be that the government's interest in the law underlying a complete ban on table dancing is different from its interest in a law underlying a complete ban on tap dancing. The relevance of the analogy Petitioners make nonetheless remains valid: a restriction on a "manner" of dance, such as dancing with metal-soled shoes or dancing within ten feet of one's audience can in effect work a complete ban on a type of dance. If table dancing is a unique form of expression, as presumably tap is, a complete ban on table dancing effected by a seemingly neutral statute must be treated just as would a complete ban on tap effected by a seemingly neutral statute.

If Petitioners are correct, a complete ban on table dancing would be content-based. As the dissenting judge below pointed out, "To the extent that a reasonable trier of fact might conclude that table dancing and stage dancing are qualitatively distinct forms of expression, the ordinance is itself facially content-based." App. A at A-29 (Reinhardt, J., dissenting). Of course, as noted above, *see supra* Part II, there was also a genuine issue of material fact as to the City's predominate purpose, an issue that should have precluded a grant of summary judgment to the City on the issue of whether the regulation was content-neutral.

Moreover, even if the law were treated as content-neutral, the ten-foot rule would fail the intermediate scrutiny test because a law that completely bans a unique medium of expression fails, as a matter of simple logic, to leave open adequate alternative avenues for that protected expression. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (striking down ban on residential signs because there was no adequate substitute and listing cases in which this Court has invalidated ordinances that completely "foreclose an entire medium of expression": *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) ("distribution of pamphlets"); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) ("handbills on the public streets"); *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943) ("door-to-door distribution of literature"); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164-65 (1939) (same); and *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981) ("live entertainment")). One could draw an analogy to a law requiring politicians to remain at least ten feet from those at a political rally (enacted, say, for the compelling governmental interest in maintaining the safety of political candidates). If hand shaking or baby holding or simply speaking face-to-face with a potential constituent could be considered a unique form of communicating, such a law would likewise leave no alternative forms of communication. The analogy goes even further since a candidate's face-to-face contact – as with the table dancer's – might be considered unique because it would give the individual voter the feeling that she or he is "special" and "important," in contrast to the feeling of "coldness and

impersonality" one feels when a political candidate addresses a group from a stage. *Cf. Frisby v. Schultz*, 487 U.S. 474, 486, (1988) (picketing focused upon individual residence is "fundamentally different from more generally directed means of communication").

In spite of Petitioners' uncontroverted evidence, the Ninth Circuit affirmed the district court's grant of summary judgment for the City. The Ninth Circuit concluded that, even assuming table dancing to be a unique medium of expression, Petitioners could not prevail: "[U]niqueness, alone, is insufficient to trigger separate First Amendment protection" because table dancing is, according to the Ninth Circuit, not "so 'uniquely valuable or important [a] mode of communication' as to be without effective substitute." App. A, at A-20 (internal citations omitted). The court based its conclusion on a *reductio ad absurdum* argument, noting that Petitioners' conclusion would imply that " 'lap dancing' . . . in which the nude or semi-nude dancer performs in the patron's lap" would likewise constitute protected expression. *Id.* at A-22.

The court's analogy is instructive, as it suggests that the court's underlying goal was in fact to eliminate table dancing as a form of communication.[13] It is clear from the court's definition of lap dancing that lap dancing is itself improper sexual contact, *see* Wash. Rev. Code § 9A.44.010(2) (1998) – that is, it is *malum per se* and therefore proscribable independent of any secondary effects with which it may be associated. *Cf. Barnes*, 501 U.S. at 572 (principal opinion of Rehnquist, C.J.) (since "governmental interest served by [a public indecency statute] is societal disapproval of nudity in public places . . . [t]he statutory prohibition is not a means to some greater end, but an end in itself"). Table dancing, in contrast, or so we are told by the City and the court below, is being prohibited not simply because it is itself wrongful, but rather because of the secondary effects associated with it. The *reductio ad absurdum* argument made by the Ninth Circuit fails, therefore, for the simple reason that a prohibition on the

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[13] *See also infra* Part III.

"*absurdum*" is permissible even if lap dancing is a unique form of expression. There is thus no "*absurdum*" to which Petitioners' argument leads since Petitioners accept that government can regulate explicit sexual contact even if such contact is expressive. Implicit in the court's analogy, then, is the assumption that table dancing, like lap dancing, is itself improper sexually oriented conduct and is therefore proscribable independent of any secondary effects with which it may be linked. Such a holding, if made explicit, would effectively eviscerate the "secondary effects" doctrine, since it would necessarily imply that expressive conduct is independently proscribable because of its sexual content. This would directly contradict a long line of this Court's cases holding that non-obscene sexually explicit speech is entitled to First Amendment protection. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997).

Ultimately, Petitioners' argument, based on their uncontroverted evidence, is that table dancing is a unique medium of expression. At the very least, however, Petitioners' evidence raised a genuine issue of material fact that should have precluded a grant of summary judgment to the City on the question whether the statute is content-neutral and the question whether the ordinance leaves ample alternative avenues of communication. As the dissenting judge below noted, "Appellants, by producing these declarations, have created a material question of fact regarding whether table dancing is, as . . . the majority conclude[s], merely stage dancing at a 'louder volume,' or whether it is an altogether different form of expression that depends upon proximity, and communicates a different and particular content." App. A at A-29 (Reinhardt, J., dissenting); *see also DCR, Inc. v. Pierce County*, 964 P.2d 380, 396 (Wash. App. 1998) (Armstrong, J., dissenting) (criticizing court's holding that "as a matter of law . . . the 'proximity' of the dance is not an element of the 'content' of the dance"); *cf. Ino Ino v. City of Bellevue*, 936 P.2d 154, 161 (Wash. 1997) (treating the issue as one of fact).

Moreover, this case squarely raises the important issue of whether a court may grant summary judgment for the government in a First Amendment challenge to legislation when the challenger provides uncontroverted evidence that the regulation is in effect "foreclos[ing] an entire medium of expression," *Ladue*, 512 U.S. at 55, as well as substantial evidence that the predominant purpose for which the regulation was enacted was the suppression of protected expression, *Renton*, 475 U.S. at 47. The Ninth Circuit's decision below thus conflicts with a long string of this Court's decisions and, if left to stand, will create law in nine states that undermines fundamental principles from which this Court has never wavered.

CONCLUSION

As the Ninth Circuit explicitly recognized, the law as it currently stands leaves many questions unsettled regarding the application of First Amendment doctrine to non-obscene, sexually explicit expression; the lower courts thus remain confused and in disarray. Where confusion reigns in the First Amendment, expression as unpopular – and, arguably, offensive – as erotic dancing is inevitably suppressed. As Justice Harlan explained, however, "one man's vulgarity is another man's lyric[, and] it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971). Petitioners respectfully request that this Court grant the Writ so as to clarify these doctrinal questions, and to do so in favor of protection for a unique medium of expression.

Respectfully submitted,

Of Counsel:

P. CAMERON DEVORE
KRAIG BAKER
DAVIS WRIGHT TREMAINE LLP
2600 Centry Square
1501 Fourth Avenue
Seattle, WA 98101

GILBERT H. LEVY*
Suite 200
Market Place Two
2001 Western Avenue
Seattle, WA 98121
(206) 443-0670

Counsel for Petitioners Frank Colacurcio, Jr., David Ebert, and Steve Fueston, d/b/a DDF&S Investment Co.

**Counsel of Record*

APPENDIX A

Frank COLACURCIO, Jr., dba DDF & S Investment Co.; David Ebert, dba DDF & S Investment Co.; Steve Fueston, dba DDF & S Investment Co., Plaintiffs-Appellants,

v.

CITY OF KENT, Defendant-Appellee.

No. 96-36197.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 10, 1998.

Decided Dec. 8, 1998.

William P. Schoel and Jayne L. Freeman, Keating, Bucklin & McCormack, Seattle, WA, Roger A. Lubovich, City Attorney, Laurie A. Evezich, Assistant City Attorney, Kent, WA, for defendant-appellee.

Appeal from the United States District Court for the Western District of Washington; Thomas S. Zilly, District Judge, Presiding. D.C. No. CV-95-01176-TSZ.

Before: HUG, Chief Judge, and REINHARDT and WIGGINS, Circuit Judges.

Opinion by Chief Judge HUG; Dissent by Judge REINHARDT.

HUG, Chief Judge:

In this case we examine whether the district court was correct in concluding as a matter of law that the City of Kent's ordinance, which requires nude dancers to perform at least ten feet from patrons, does not violate the First Amendment of the United States Constitution. Appellants, who planned to open a nightclub featuring

nude dancing on stage and personalized table dancing, argue that the ten-foot distance requirement amounts to a complete ban on table dancing, which they allege is a unique form of expression entitled to separate First Amendment analysis. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

I.

Factual Background

Appellants desire to open a non-alcoholic adult nightclub in the City of Kent, Washington, featuring nude dancing on stage and personalized table dances. Appellants located a site in Kent and applied for a building permit.

The City of Kent has examined issues related to adult entertainment for several years. In 1982, the City's planning department published a study on the effects of adult entertainment on surrounding communities, including a discussion of various regulatory alternatives. Kent's initial regulatory effort involved a zoning ordinance, which Appellants challenged in 1994. The district court found that the zoning ordinance failed to designate a sufficient number of sites for the location of adult businesses. Pursuant to a settlement agreement, the City agreed to treat Appellants' proposed business as a lawful non-conforming use under the zoning law.

In March 1995, the Kent City Council adopted Adult Entertainment Ordinance 3214, establishing new standards for the licensing and operation of adult uses in Kent. In April 1995, that ordinance was amended by Ordinance 3221, in an effort to conform the legislation to

the King County Superior Court's ruling on a similar ordinance in Bellevue, Washington. Ordinance 3221, which has been codified as Kent City Code § 5.10.010 *et seq.*, provides, in relevant part:

> The portion of the exotic dance studio premises in which dancing and adult entertainment by an entertainer is performed shall be a stage or platform at least twenty-four (24) inches in elevation above the level of the patron seating areas. KCC § 5.10.110(A).
>
> No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron. KCC § 5.10.120(A)(3).

The code also specifies minimum lighting requirements and prohibits dancers from soliciting or receiving tips from patrons. Shortly after enactment of the ordinance, Appellants brought this action for declaratory relief and damages pursuant to 42 U.S.C. § 1983.

Appellants contend that the ten-foot rule would effectively eliminate table dancing, which they argue is a unique form of expression entitled to separate First Amendment analysis. Unlike nude dancing performed on stage, table dancing is performed in close proximity to patrons. Appellants have submitted declarations of a cultural anthropologist and a communications expert attesting to the uniqueness of table dancing and the potentially detrimental effects of the ten-foot rule on the dancers' erotic messages. Appellants also argue that table dancing is the primary source of income for exotic dancers, and that the Kent ordinance would make it uneconomical and therefore impossible for exotic dance studios to open or operate in Kent.

The City filed a motion for summary judgment, which the district court granted in November 1996. The district court ruled as a matter of law that (1) the ordinance was a content-neutral time, place and manner regulation; and (2) the ten-foot distance requirement was narrowly tailored and left open ample alternative avenues for communication of protected artistic expression. Appellants filed a timely notice of appeal.

II.

Standard of Review

A grant of summary judgment is reviewed *de novo*. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir.1997). We must determine, viewing the evidence in the light most favorable to Appellants, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* We do not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue of material fact for trial. *Id.* When a mixed question of fact and law involves undisputed underlying facts, summary judgment may be appropriate. *Han v. Mobil Oil Corp.*, 73 F.3d 872, 875 (9th Cir.1995).

III.

Level of Protection for Nude Dancing

The parties and the district court correctly acknowledge that nude dancing is a form of expressive conduct

protected, to some degree, by the First Amendment.[1] There is understandable confusion, however, about the level of such protection. The district court cited a plurality opinion of the Supreme Court indicating that nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Appellants cite to pre-*Barnes* Ninth Circuit precedent which accorded nude dancing full First Amendment protection. *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir.1986).

The fragmented nature of Supreme Court opinions dealing with nude dancing in particular and sexually explicit but non-obscene conduct in general has resulted in a lack of clear guidance on the level of First Amendment protection afforded to this type of expression. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), which involved a zoning ordinance governing the location of adult theaters, a plurality of the Court agreed that adult entertainment should be regarded as "low value" speech: "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *Id.* at 70, 96 S.Ct. 2440. However, five Justices in *Young*, one concurring and four dissenting, argued that First Amendment protection

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[1] Supreme Court has determined that conduct is expressive when the following two factors are present: (1) intent to convey a particularized message; and (2) a substantial likelihood that the message will be understood by those receiving it. *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974).

should not vary with the social value ascribed to speech by the courts. *See id.* at 73 n. 1, 96 S.Ct. 2440 (Powell, J., concurring); *Id.* at 85-87, 96 S.Ct. 2440 (Stewart, J., dissenting). Writing for our court in 1986, Judge Pregerson in Kev alluded to the voting tally in Young when he ascribed full First Amendment protection to nude dancing. Kev, 793 F.2d at 1058.

Fifteen years after *Young*, a plurality of the Supreme Court including Justices Rehnquist, O'Connor, and Kennedy, reiterated that nude dancing enjoys only marginal First Amendment protection. *Barnes*, 501 U.S. at 565-66, 111 S.Ct. 2456.[2] Two Justices concurred in *Barnes*, with four dissenters advocating full First Amendment protection. Because one concurrence did not reach the issue, *Barnes* represents a four-four split on the matter.[3]

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[2] *See also Schad v. Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (stating that "nude dancing is not without its First Amendment protections"); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (noting that nude barroom dancing may involve only the "barest minimum of protected expression" which "might be entitled to First and Fourteenth Amendment protection "under some circumstances.").

[3] Justice Scalia, concurring, determined that because the statute did not regulate nude dancing in particular but instead regulated public nudity in general, the law was not specifically directed at expression and therefore was not subject to First Amendment scrutiny at all. *Barnes*, 501 U.S. at 572, 111 S.Ct. 2456 (Scalia, J., concurring). Justice Souter, concurring, accorded a low-level of First Amendment protection to nude dancing, noting that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Barnes*, 501 U.S. at 584, 111 S.Ct. 2456 (Souter, J., concurring) (citing *Young*, 427 U.S.

Scholars have grappled with the problem of the uncertain status of nude dancing and adult entertainment under the First Amendment. Professor Lawrence Tribe noted that "no Court has yet squarely held that sexually explicit but non-obscene speech enjoys less than full First Amendment protection." Tribe, *American Constitutional Law* §§ 12-18, p. 938 (2d Ed.1988). Although his comment was made prior to *Barnes*, the observation continues to be accurate today. Professor Erwin Chemerinsky views Supreme Court precedent as according sexually explicit expression "low-value" status. Chemerinsky, *Constitutional Law* § 11.3.4.4, p. 836-41 (1st Ed.1997). Professors Gerald Gunther and Kathleen Sullivan suggest that even in cases where courts do not explicitly treat sexual expression as lower-value speech, the decisions have implicitly treated such speech as a "subordinate species" in their tolerance of content-specific regulation. Gunther and Sullivan, *Constitutional Law* § 5(D), p. 1155-56 (13th Ed.1997).

IV.

Content Neutrality

Appellants contend that the district court erred in determining that the Kent Ordinance is content-neutral as a matter of law. Appellants argue that the ordinance is content-based on its face, and that the record shows that the City's predominant intent in passing the Ordinance

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at 70, 96 S.Ct. 2440)). Dissenting Justice White, joined by Justices Marshall, Blackmun, and Stevens, argued for full First Amendment protection for nude dancing. *Barnes*, 501 U.S. at 593, 111 S.Ct. 2456 (White, J., dissenting).

was to ban adult entertainment in Kent. This contention is based on statements made by the mayor and other city officials, in addition to Kent's alleged pattern of adopting restrictive ordinances in response to proposals to build exotic dance studios.

Municipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The Supreme Court has determined that this test is similar or identical to the *O'Brien* test generally applied to regulations affecting symbolic speech.[4]

In determining whether an ordinance is content-neutral, our principal inquiry is "whether the government

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[4] "[V]alidating a regulation of expressive conduct . . . in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). Under the standard set out in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), a regulation of symbolic expression is sufficiently justified if it: (a) is within the constitutional power of government; (b) furthers an important or substantial governmental interest unrelated to the suppression of expression; and (c) the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest. *Id.* at 377, 88 S.Ct. 1673. The Ninth Circuit frequently cites both tests when analyzing regulations of adult entertainment. *See, e.g., Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334-35 (9th Cir.1986) ("*Walnut I*"); *Kev*, 793 F.2d at 1058-59 & n. 3 (9th Cir.1986).

has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. The content-neutrality requirement is met if the involved ordinance is " 'aimed to control secondary effects resulting from the protected expression,' rather than at inhibiting the protected expression itself." *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir.1987)(quoting *Int'l Food and Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir.1986)). *See also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29. Secondary effects may include, but are not limited to, threats to public health or safety. Building upon the Supreme Court's reasoning in *Renton*, we outlined the appropriate test in *Tollis*:

> If the ordinance is predominantly aimed at the suppression of First Amendment rights, then it is content-based and presumptively violates the First Amendment. If, on the other hand, the predominant purpose of the ordinance is the amelioration of secondary effects in the surrounding community, the ordinance is content-neutral, and the court must then determine whether it passes constitutional muster as a content-neutral time, place and manner regulation.

827 F.2d at 1332 (internal citation omitted).

A city may establish its interest in a regulation by relying upon evidence "reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925. In evaluating the secondary effects of adult entertainment, the city is also permitted to rely on experiences of other jurisdictions. *Id.* A regulation is content-neutral if it is "justified without reference to

the content of the regulated speech." *Id.* at 48, 106 S.Ct. 925 (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)). A finding that the restriction of First Amendment speech is a "motivating factor" in enacting an ordinance is not of itself sufficient to hold the regulation presumptively invalid. *Id.* at 46-49, 106 S.Ct. 925.

The case law has not clarified when secondary effects warrant restriction of speech and how much proof there must be of these effects.[5] Similarly, precedent provides no standards for determining when an illicit but inconsequential "motivating factor" might develop into an illicit and controlling "predominant purpose." Precedent suggests that government defendants generally will prevail on the issue of content neutrality if evidence shows that the enactment can be "justified without reference to . . . speech." *See Kev*, 793 F.2d. at 1058-59 (internal quotations and citations omitted). This is a difficult standard to overcome, unless the challenger can show that the statute is speech-discriminatory on its face. *See, e.g., BSA, Inc. v. King County*, 804 F.2d 1104, 1108-09 (9th Cir.1986) (holding unconstitutional county ordinances which specifically exempted barroom nude dancing from their definitions of "expressive dance," thus effecting complete bans on nude dancing).

Contrary to Appellants' contention, the Kent ordinance is not content-based on its face. The ordinance does not distinguish between table dancing and other exotic

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[5] Chemerinsky, *Constitutional Law*, § 11.3.4.4., p. 840 (1997).

dance forms. Nor do the stated purposes mention the ills of table dancing or the goals of restricting offensive conduct. The ten-foot distance requirement applies to all forms of dancing within exotic dance studios.

We will look to the full record to determine whether evidence indicates that the purpose of the ordinance is to suppress speech or ameliorate secondary effects. In so doing, we will rely on all "objective indicators of intent," including the "face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir.1984). The district court was correct in rejecting the City's claim that the court need only look to the stated purposes of the ordinance to find a permissible purpose.

Appellants cite to statements by city officials and others allegedly revealing the City's underlying speech-suppressive purposes. For example, Appellants quote the following statement by the City Attorney at a Planning Commission meeting:

> Since we cannot zone these type[s] of businesses out of the City, the licensing was looked at that was in place for this type of facility . . . As indicated, these uses cannot be prohibited, but they can be regulated.

Appellants also cite the following statement from the Planning Committee Chairman:

> With all the regulations we have adopted and stuff, I'm not too concerned that someone's going to come and try to open something up. Because we've made it a little bit difficult for

them to make money in the traditional way they make money.

In determining the extent to which comments such as these should inform our analysis of predominant intent, we look to our decision in *Foley*. In *Foley*, we noted that individual statements by city leaders were admissible if they "showed the chain of events from which intent may be inferred, rather than merely the subjective intent of individual legislators." *Id.* at 1298. Put another way, the subjective statements cited by Appellants are relevant if they show objective manifestations of an illicit purpose, such as a departure from normal procedures or a sudden change in policy.[6] In the present case, the record does not indicate unusual procedural maneuvering on the part of the Kent Planning Committee, Planning Commission, City Attorney, or other City governing bodies. The enactment of the Kent Ordinance was consistent with the City's comprehensive planning policy, and reflects no procedural lapses that might suggest unjust treatment. Objective indicators of illicit purpose are not present here.

Appellants disagree, contending that Kent's history reflects a clear pattern of adopting "the most restrictive regulations possible" in response to proposals to build nude dance studios in the City. This contention is rebutted by the record. The record indicates that Kent's

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[6] Equal protection cases may provide some guidance in this regard. *See, e.g, Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 267-68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (allowing courts to consider "contemporary statements by members of the decisionmaking body" as evidence of sudden changes in policy or departure from normal procedures).

approach has grown more lenient over time. Evidence suggests that after the failed zoning attempt, City leaders learned that unduly restrictive regulations would not survive judicial review. The City Attorney's comments at a 1995 Planning Commission meeting reflect this awareness: "These uses cannot be prohibited but they can be regulated . . . the question is where do we put this type of business and how many sites do we allow." The record indicates that the City devoted considerable resources to developing an ordinance that would be constitutionally sound. Kent's distance requirements were modeled after regulations upheld in Kitsap County, Bellevue, King County, and Kelso.[7]

Even if we were to accord substantial weight to the mixed motivations of certain City officials, the record indicates that the City's documentation of permissible purposes satisfies *Virginia Pharmacy Board* and *Renton*. Kent's ordinance was based on a comprehensive study of adult entertainment businesses and their secondary impacts. In formulating the ordinance, the City relied on the study, concluding that regulation of adult uses was an important factor in controlling prostitution, drug dealing, and other criminal activity. *See e.g., Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1258 (5th

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[7] Kent's 1982 study also indicates an intent to assimilate rather than eliminate adult uses: "The City of Kent seeks to assimilate adult uses into the overall urban fabric with the least adverse impact to the business and residential environments." City of Kent Planning Dept., Adult Use Zoning Study 41 (1982). "A secondary objective is to discuss the ability of the City to provide services – primarily protective services – based on alternative locational requirements for adult uses." *Id.*

Cir.1992) (treating reliance on formal studies as evidence of permissible purpose). The record also includes affidavits and statements by police officers and vice detectives documenting the connection between table dancing and illegal sexual activity. We find, therefore, that the Kent Ordinance is justified without reference to speech.

V.

Narrow Tailoring

Appellants argue that the ten-foot distance requirement fails the narrow tailoring requirement because there are less-speech-restrictive means of achieving the same results. Appellants contend that summary judgment was improper because the district court failed to consider less burdensome alternatives such as a "no touch" ordinance and a one-foot distance requirement.

A regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests, but it need not be the least restrictive or the least intrusive means of doing so. *Ward*, 491 U.S. at 798-99, 109 S.Ct. 2746. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Id.* at 799, 109 S.Ct. 2746 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). This standard does not mean that a time, place or manner regulation may burden substantially more speech than necessary to further the government's interests. "Government may not regulate expression in such a manner that a substantial

portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799, 109 S.Ct. 2746.

The validity of a time, place, or manner regulation "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897 (citing *Clark*, 468 U.S. at 299, 104 S.Ct. 3065). Such restrictions will not violate the First Amendment "simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897.

The district court was correct in concluding that the ten-foot setback is narrowly tailored to achieve Kent's objectives. The courts have emphasized that judges should not supplant the legislature's role in developing the most appropriate methods for achieving government purposes. *See, e.g., DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir.1997) (upholding a six-foot distance requirement, the court stated that "it is not for us to say that a seven-foot zone or a five-foot zone would strike a better balance.")

As to whether the ordinance burdens substantially more expression than necessary, the district court was correct in concluding that this argument is foreclosed by our earlier decision in *Kev*, which upheld a similar ten-foot distance requirement. *Kev*, 793 F.2d at 1061. Appellants argue that because *Kev* was decided prior to the Supreme Court's decision in *Ward*, the *Kev* court did not have occasion to apply the *Ward* test, which protects speech from unnecessary burdens. *See Ward*, 491 U.S. at 798, 109 S.Ct. 2746.

This argument fails for two reasons. First, we need not reach the issue, as we leave the fine-tuning of the distance requirement to the legislative body. Second, at the time *Kev* was decided, Supreme Court precedent included speech-protective language similar or identical to that in *Ward*. *See, e.g, Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (requiring the ordinances in question to "respond [ ] *precisely* to the substantive problem which legitimately concerns [the government]."") (emphasis added); *Clark*, 468 U.S. at 297, 104 S.Ct. 3065 (same); *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673 (requiring the incidental restrictions on First Amendment freedoms to be "no greater than is essential to the furtherance" of the asserted governmental interests).

Several courts have upheld distance requirements as a narrowly tailored means of controlling illegal sexual contact and narcotics transactions. In *BSA Inc.*, we upheld a six-foot distance requirement while prohibiting a total ban on nude barroom dancing, stating that the distance requirement "imposes at most a very minimal restriction on First Amendment activity." 804 F.2d at 1112. The four dissenting Justices in *Barnes*, arguing against the statewide ban on public nudity, supported distance requirements as a less-restrictive means of furthering the government's interest in protecting public health and safety. *Barnes*, 501 U.S. at 594, 111 S.Ct. 2456. *See also, DLS, Inc. v. Chattanooga*, 107 F.3d 403 (6th Cir.1997) (six-foot distance requirement); *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272 (Colo.1995) (en banc) (three-foot); *Zanganeh v. Hymes*, 844 F.Supp. 1087 (D.Md.1994) (six-

foot); *T-Marc, Inc. v. Pinellas County,* 804 F.Supp. 1500 (M.D.Fla.1992) (three-foot); *Ino Ino, Inc. v. City of Bellevue,* 132 Wash.2d 103, 937 P.2d 154 (Wa.1997) (en banc) (four-foot).

Furthermore, the less-restrictive alternatives presented by Appellants arguably are not "reasonable" alternatives as they would not serve the City's purposes of controlling drug transactions and prostitution. The one-foot and "no-touch" ordinances would be unenforceable, as both would fail to provide sufficient line-of-vision for law enforcement personnel. An earlier "no-touch" ordinance in Kent failed for this reason. In addition, both of these options would permit verbal communication between dancers and patrons, thereby failing to curtail propositions for drugs or sex.[8] It is unclear from the record whether Appellants would support a four-foot distance requirement. While claiming at one point that such a regulation would be narrowly tailored, Appellants state elsewhere in the record that a four-foot requirement put them out of business in Bellevue. Although a four-foot distance requirement would keep patrons and dancers just out of arm's reach, a ten-foot requirement covers two arm spans and keeps patrons out of earshot. Appellants have failed to present evidence showing that a ten-foot rule burdens substantially more expression than necessary to achieve its purpose. We find, therefore,

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[8] We note that, according to Appellants' own evidence, an ordinance imposing a distance requirement any greater than six inches would effectively ban table dancing. The declaration of Appellants' expert cultural anthropologist defines table dancing as a dance performed in front of an audience at a distance of one to six inches.

that summary judgment was proper on the issue of content-neutrality.

VI.

Alternative Channels of Communication

The final attribute of a valid time, place and manner regulation is that it must "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. What makes this case unusual is Appellants' claim that table dancing is a unique form of protected expression that is qualitatively different from nude stage dancing and entitled to separate First Amendment analysis. Appellants contend that the Kent ordinance fails to leave open ample alternatives, as a ten-foot distance requirement would eliminate table dancing altogether, an essential element of which is close proximity between dancers and patrons. Appellants argue that, unlike stage dancing, table dancing uses "not just vision but multi-sensory perception to communicate its message though the sounds, smells, and movements of the dancer within the [patron's] intimate perimeter." Therefore, the district court misapplied the law by failing to acknowledge the uniqueness of table dancing and instead holding that the ordinance "merely diminishes to a limited degree the effectiveness of the erotic message conveyed by the dance." Appellants support their theory with declarations of a cultural anthropologist and a communications expert attesting to the uniqueness of table dancing and the detrimental effect of the ten-foot rule on the dancer's message.

The Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 525-27, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (Brennan, J., concurring). The Court has been particularly hesitant to close off channels of communication which provide individuals with inexpensive means of disseminating core political messages. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 54-56, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (ordinance banning residential signs almost completely foreclosed "a venerable means of communication that is both unique and important" and for which there is no adequate substitute, particularly for persons of modest means);[9] *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 146, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.").

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[9] The *Ladue* Court noted, "[r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate." *Ladue*, 512 U.S. at 57, 114 S.Ct. 2038. The Court also noted that "Ladue's ordinance covers even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war." *Id.* at 54, 114 S.Ct. 2038 (internal citations omitted).

Assuming arguendo that table dancing is a unique form of expression, precedent indicates that uniqueness, alone, is insufficient to trigger separate First Amendment protection. We recently emphasized this point in *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009 (9th Cir.1996). Acknowledging that a ban on wearing message-bearing T-shirts would raise serious constitutional questions, the same was not true for selling T-shirts: "[W]e do not believe the sale of message-bearing T-shirts is so 'uniquely valuable or important [a] mode of communication' as to be without effective substitute." *Id.* at 1015 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (emphasis added)).[10]

Appellants' argument misses a central point – in assessing a First Amendment challenge, we look not only at the private claims asserted in the complaint, but into the governmental interests protected by the enactment. As the Supreme Court noted in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with . . . 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.' " *Id.* at 389, 112 S.Ct. 2538 (quoting *Renton*, 475 U.S. at 48, 106

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[10] The court elaborated on this point: "While selling T-shirts is a unique form of expression in the sense that serving message-bearing raviolis or preaching on street corners in a Donald Duck voice would be unique, it does nothing to make the message uniquely significant or effective." One World, 76 F.3d at 1015.

S.Ct. 925). Using this reasoning, we upheld an ordinance prohibiting "tagging," the practice of distributing flyers and soliciting funds from automobile passengers while stopped at red lights. *Acorn v. City of Phoenix*, 798 F.2d 1260 (9th Cir.1986). Although the appellants, a non-profit group, had argued that tagging was a "uniquely effective method of fundraising," *id.* at 1271, we determined that the ordinance was justified for traffic control and public safety purposes. *Id.* at 1268-70. *See also Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 117 S.Ct. 855, 866, 137 L.Ed.2d 1 (1997) (holding that public safety interests justified fifteen-foot "fixed buffer zone" separating abortion protestors from abortion clinics). The prohibitions in Acorn and Schenck were upheld despite the fact that they were analyzed under the rigorous standards applied to speech regulation in traditional public forums, where "the government's ability to permissibly restrict expressive activity is very limited." *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983).[11] We conclude that table dancing in private nightclubs, with documented links to prostitution and drug dealing, is a highly unlikely candidate for special protection under the First Amendment.

In support of their claim that the Kent ordinance effects a complete ban on a unique mode of expression,

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[11] Traditional public forums are "places which by long tradition or government fiat have been devoted to assembly and debate." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Although in *Acorn*, we did not decide whether traffic-filled intersections should be considered public forums, we nevertheless applied public forum analysis to the case. *Acorn*, 798 F.2d at 1267.

Appellants borrow from public forum analysis to argue that the applicable "forum" for a table dance is not the whole cabaret, but merely the area required for performing the table dance. According to this argument, the ten-foot distance requirement fails to leave open ample alternative avenues of expression within that forum.

Although the time, place and manner test applied to regulations affecting adult entertainment was initially developed for speech in public forums, Appellants are incorrect in attempting to extend all aspects of the public forum principle to private nightclubs. Even assuming the forum concept were applicable here, Appellants' argument fails due to the incongruity of its potential results. Following Appellants' logic, we would be required to provide separate First Amendment protection to so-called "lap dancing," arguably another unique form of expressive conduct in which the nude or semi-nude dancer performs in the patron's lap. Any distance requirement, even a one-foot setback, would amount to a flat ban on communication within that "forum."

Appellants' fluid definition of relevant forums, if carried to its logical conclusion, would require courts to subdivide audiences to the extent that any speech-restrictive regulation would necessarily fail. Again, Appellant's theory would lead to the ironic result that forms of expressive conduct with documented connections to criminal activity would enjoy special constitutional protection. The district court was correct in rejecting this proposition. If forum analysis is relevant here, the appropriate forum is the entire cabaret. Even assuming that the audiences for table dancing and stage dancing are distinguishable, there is undoubtedly a high degree of overlap.

The ten-foot distance requirement does not rob dancers of their forum or their entire audience.

Appellants also provide an economic argument to support their claim that a ten-foot distance requirement would foreclose an entire medium of expression. Appellants contend that the distance requirement and prohibition on tipping would prevent exotic dancers from making a living in Kent, and would make it uneconomical and therefore impossible for adult clubs to open and operate in the city. Appellants allege that income from table dances is the main source of revenue for Appellants' entertainers, who are not compensated for stage dances. Table dancers in Appellants' establishments are independent contractors who pay rental fees to the dance studios. These fees are a primary source of revenue for the enterprise. Appellants allege that the four-foot distance requirement imposed in Bellevue caused profits to drop at their Bellevue establishment, requiring it to close.[12]

We recognize that determining whether a governmental action will foreclose an entire medium of expression can be a difficult undertaking. In some cases, as in *Ladue* (signs) or *Struthers* (handbills), a ban will be evident from the face of the ordinance. In other instances, as in the case at bar, it is not. The test for determining whether an adult business' First Amendment rights are

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[12] Appellants allege that, after a four-foot setback requirement was effectuated in Bellevue, the average number of dancers per week dropped from fifty to twelve, and thirty-eight dancers quit their jobs. Appellants also noted that "few if any" patrons purchased table dances.

threatened is whether a [sic] the government has "effectively den[ied]" the business "a reasonable opportunity to open and operate" within the city or area in question. *Renton*, 475 U.S. at 54, 106 S.Ct. 925. We elaborated on this test in *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663 (9th Cir.1996). The test is whether a business could operate under the regulations at issue, not whether a particular business will be able to compete successfully within the market. *Id.* at 666.[13] "[I]n the absence of any absolute bar to the market . . . it is irrelevant whether '[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business'." *Id.* (quoting *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1531 (9th Cir.1993)).

The market access test has been applied to adult zoning cases, where total foreclosure of the market can be ascertained by calculating available locational sites. We have held unduly restrictive adult zoning ordinances to be unconstitutional on this basis. *See, e.g., Walnut Properties, Inc. v. City of Whittier (Walnut Properties II)*, 861 F.2d 1102, 1110 (9th Cir.1988) (holding that zoning ordinance's acute restriction on available acreage would deny adult theaters a reasonable opportunity to operate in the city, and would force closure of all existing adult businesses).

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[13] In other words, *Spokane Arcade* clarified that the scope of permissible economic analysis is whether one is permitted to enter or participate in the market in the first instance. *Id.* "Even if the costs of compliance were so great that [appellants] would be forced out of business, the ordinance[ ] do[es] not pose any intrinsic limitation on the operation of the [business]." *Id.* at 667.

The analysis may be even more complicated when, as here, distance requirements are involved. However, Appellants have not presented economic evidence sufficient to show that the ten-foot distance requirement would serve as an absolute bar to market entry, as required under *Spokane Arcade*. Rather, Appellants have merely shown a potential loss in profits, which arguably could be remedied by restructuring the way they do business. The fact that Appellants hire their dancers on an independent contractor basis, refuse to pay their dancers for dancing on stage, require their dancers to pay rental fees, and limit their dancers' remuneration to tips from patrons, appears to us to be an effort to maximize profits while minimizing dancers' economic security.

As to Appellants' contention that table dancing is a unique form of expression entitled to separate First Amendment analysis, this issue is not outcome determinative, because uniqueness, alone, is insufficient to trigger special protection.

VII.

For the reasons described herein, we determine that the district court was correct in ruling as a matter of law that the Kent ordinance is content neutral, and that the ten-foot distance requirement is narrowly tailored and leaves open ample alternative avenues for communication of protected expression. The judgment of the district court is

AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

I respectfully dissent. I believe that the district court erred in granting summary judgment. By requiring nude dancers to perform on a raised platform and to remain at least ten feet away from customers, the City of Kent effectively outlawed table-dancing. The issue before us is whether table dancing constitutes a separate form of expressive communication from other types of nude dancing – that is, whether table dancers communicate a message different in content than that communicated by nude stage dancers, and other nude dancers who perform at a distance of more than ten feet from their customers. The appellants presented sufficient evidence to establish a triable issue of fact on that question. By doing so, they have precluded a judicial determination that the ordinance is content-neutral as a matter of law. Because the district court reached that very conclusion, I would reverse and remand for trial.

As an initial matter, I disagree with Section III of the majority opinion, which resolves no legal issues, but seeks to leave the impression that nude dancing may merely be "low-value" speech entitled to "only marginal First Amendment protection." The panel admits that erotic dancing is constitutionally protected but claims that the extent of that protection is unclear, thus implying that it is unnecessary to look too closely at the restrictions on speech at issue in this case. I disagree. In this Circuit, it *is* clear that nude erotic dancers are entitled to full First Amendment protection for the expressive messages conveyed in their dancing. *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir.1986).

I also disagree with the majority that the ten foot setback at issue in this case is content-neutral as a matter of law. A regulation on constitutionally protected speech is content-neutral only if it is justified without reference to the content of the regulated speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Kent's ordinance requires that all entertainers perform on a stage at least two feet above the patron seating area, and that no performer may dance any closer than ten (10) feet from any patron. The majority concludes that this law is content-neutral because it is not content-based "on its face."

This determination obviously begs the question at issue here: what is the content of the message communicated by the table dancer, as opposed to the stage dancer? If it is the same message – only magnified by proximity – then the majority is correct. If, however, stage dancers and table dancers communicate different expressive content in their respective messages, then summary judgment was improper. Appellants argue that the ordinance on its face bans certain forms of communication because it bars close physical proximity between dancers and patrons. They assert that proximity itself – the distance, or lack thereof, between the dancer and the patron – is integral to the message conveyed by table dancing. This message is entirely different, they contend, than the message conveyed by stage dancers.

In support of this contention, appellants proffered the testimony of cultural anthropologist Judith Hanna, a Senior Research Scholar at the University of Maryland. Hanna is the author of four books and approximately 80 scholarly articles on the anthropology of dance as non-

verbal communication. She has conducted extensive fieldwork in exotic dance establishments as well as interviews with dancers and patrons. Hanna asserts that table dancers seek to send a message that is entirely different from that sent by stage dancers:

> The message of the table dancer is personal interest in and understanding of the customer. . . . The entertainer creates an illusion of concern and availability for the customer and seeks to effect a transformation in the patron's feelings. Some customers get the personal attention of an attractive female who would not otherwise related [sic] to them or "give them the time of day;" some customers are reminded of what is [sic] to be desired.

Hanna concluded that close proximity between the dancer and the patron is an integral and essential part of the message itself. This is so, according to Hanna, not only because of the message of personal interest sent by the dancer's physical presence but also by other nonverbal communication that is only possible in close quarters. Specifically, Hanna testified that "proximity permits eye contact and awareness of indicators of attraction and satisfaction such as the mouth position, eye brightness, pupil dilation and expansion, facial color, breath, perfume, and body odors."

Appellants also introduced the declaration of Dr. Edward Donnerstein, the chair of the University of California-Santa Barbara Department of Communications who has studied the impact of distance on audience perceptions of erotic dance performances. Dr. Donnerstein, who was the lead social scientist called to give

expert testimony before former United States Attorney General Edwin Meese's Commission on Pornography, concluded that proximity is not merely an incidental component of erotic dance but is integral to the message itself. He concluded that

> The relational and erotic communication sought to be communicated by erotic dance performance is significantly and substantially effected (sic), reduced, and degraded by the requirement that performers be separated from their intended audience by a minimum distance of ten (10) feet.

Both Hanna and Donnerstein contrasted the message sent by physical closeness with that sent by the distance imposed by stage dancing, which, Hanna testified, transmits an entirely different signal: "coldness and impersonality." Appellants contend, with the support of their experts' declarations, that stage dancing communicates "the remoteness of the 'unreachable' object of desire" through its use of distance. Appellants, by producing these declarations, have created a material question of fact regarding whether table dancing is, as the district court and the majority conclude, merely stage dancing at a "louder volume," or whether it is an altogether different form of expression that depends upon proximity, and communicates a different and particular content.

To the extent that a reasonable trier of fact might conclude that table dancing and stage dancing are qualitatively distinct forms of expression, the ordinance is itself facially content-based. Moreover, evidence was adduced by appellants that Kent banned proximity precisely because it wants to constrain dancers from doing

the very things that according to appellants' experts are essential to the message – chiefly getting close enough to the patrons so that they can communicate the message in the form that only table dancing permits.

Given the circumstances set forth above, the factual issue created by appellants' expert testimony is one for a jury. It was not appropriate for the district court or this court to substitute its own views regarding the purpose and effect of table dancing and decide as a factual matter the content of the message conveyed by that form of expressive communication. Accordingly, I would reverse the district court's grant of summary judgment.

APPENDIX B

Frank COLACURCIO, Jr., et al., Plaintiffs,

v.

CITY OF KENT, Defendant.

No. C95-1176Z.

United States District Court,
W.D. Washington.

Nov. 1, 1996.

Gilbert Henry Levy, Seattle, WA, for Plaintiffs.

William P. Schoel, Jayne L. Freeman and Keating, Bucklin & McCormack, Seattle, WA, Roger A. Lubovich, City Attorney, Kent, WA, for Defendant.

ORDER

ZILLY, District Judge.

THIS MATTER comes before the Court on the City of Kent's motion for summary judgment (docket no. 20). The Court heard oral argument on the motion on August 30, 1996, and subsequently requested supplemental briefing on certain issues.[1] The Court, having considered the

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[1] By Minute Order entered September 19, 1996, the Court directed the parties to file supplemental briefs on the following issues: (1) whether table dancing itself is a "uniquely valuable or important mode of communication" entitled to First Amendment protection (*see Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812, 104 S.Ct. 2118, 2132-33, 80 L.Ed.2d 772 (1984)), such that the regulation of table dancing, as opposed to erotic dancing as a whole, is subject to the "narrow tailoring" test as

parties' arguments and all papers filed in support of and in opposition to the defendant's motion, including the parties' supplemental memoranda, hereby GRANTS defendant's motion for summary judgment and DISMISSES plaintiffs' federal law claims with prejudice. The Court dismisses plaintiffs' state law claims without prejudice.

Background

Plaintiffs Frank Colacurcio, Jr., David Ebert, and Steve Fueston, doing business as DDF & S Investment Company, desire to open a nonalcoholic adult nightclub in the City of Kent which will feature erotic entertainment, including nude dancing on stage and table dancing. The plaintiffs have located a site for their business in the City of Kent and applied for a building permit. Pursuant to a settlement agreement between the plaintiffs and the City of Kent in a case challenging the City's zoning laws, the City agreed to treat the plaintiffs' business as a lawfully established non-conforming use under the City of Kent adult use zoning laws once the building permit was issued.

On March 7, 1995, the Kent City Council adopted Ordinance 3214, which sets new standards for the licensing and operation of adult uses in the City of Kent. On

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set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661 (1989), (2) whether the "10 foot" rule in the ordinance imposes any non-economic burdens on the dancer's ability to communicate effectively, and (3) whether the "10 foot" rule in the ordinance leaves open ample alternative avenues of communication.

April 18, 1996, that ordinance was amended by Ordinance 3221, in an effort to conform to the King County Superior Court's ruling on a similar ordinance in Bellevue. *See Ino Ino, Inc. v. City of Bellevue*, King County Cause No. 95-2-02025-9. Adult Entertainment Ordinance 3221, which has been codified as Kent City Code § 5.10.010 et seq., provides in part:

> The portion of the exotic dance studio premises in which dancing and adult entertainment by an entertainer is performed shall be a stage or platform at least twenty-four (24) inches in elevation above the level of the patron seating areas. [KCC 5.10.110(A)].
>
> All dancing and adult entertainment by an entertainer shall occur on the entertainment performance areas intended for that purpose described in section 5.10.110(A). [KCC 5.10.120(A)(2)].
>
> *No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron.* [KCC 5.10.120(A)(3)] (emphasis added).

Because the nightclub the plaintiffs intend to open in Kent will feature nude dancing and erotic entertainment, it is subject to the requirements of the ordinance.

Soon after the City adopted the ordinance, the plaintiffs brought this action for declaratory relief and damages pursuant to 42 U.S.C. § 1983. Plaintiffs challenge the constitutionality of the ordinance's "10 foot rule," arguing that it effectively eliminates "table dancing," which they contend is a unique medium of expression protected by the First Amendment. Table dancing, the plaintiffs contend, is the primary source of income for erotic

dancers, and its elimination as a form of entertainment makes it economically unfeasible for dancers to dance in, and adult entertainment businesses to operate in, the City of Kent. Plaintiffs argue that "[i]n the context of erotic dancing, moving the dancer ten feet away from the patron actually effects (sic) and substantially alters and degrades the erotic message being conveyed. . . . A lesser set back between patrons and entertainers has proven to be sufficient to cure the problems of illegal sexual contact." Plaintiffs' Opposition Memo at 8 (docket no. 27). Plaintiffs also contend that the ordinance is an unconstitutional time, place, and manner regulation because the record shows that the Kent City Council's predominant purpose in passing the ordinance was to suppress protected speech, not to control the secondary effects resulting from that speech.

Discussion

I. *Summary Judgment Standard*

Summary judgment is proper only if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the burden of establishing an absence of genuine factual issues. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir.1990). The party opposing summary judgment may not rest upon the mere allegations or denials of his or her pleading, but must set forth specific facts demonstrating the existence of a genuine issue for trial. Fed.R.Civ.P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The Court should assume the truth of evidence proffered by the party opposing summary judgment and draw all reasonable inferences in a light most favorable to the nonmoving party. *Lindahl v. Air France*, 930 F.2d 1434, 1437 (9th Cir.1991). The Court need not make findings of fact; rather the Court need only perform a threshold inquiry to determine whether genuine material issues exist that can only be resolved by a trier of fact. *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511.

In this case, the parties do not dispute the existence or application of the ordinance being challenged, and there are no genuine issues of material fact relevant to the constitutional analysis. Therefore, it is appropriate for the Court to determine on summary judgment whether the ordinance is constitutional. *Cf. Paulsen v. Gotbaum*, 982 F.2d 825, 828 (2nd Cir.1992).

II. *The Ordinance is a Permissible Time, Place and Manner Regulation under the First Amendment*

Erotic dancing is a protected expression under the *First Amendment. Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir.1986); *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir.1986). Similarly, nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 560, 111 S.Ct. 2456, 2457, 115 L.Ed.2d 504 (1991). Although erotic dancing, nude or otherwise, is expression protected by the First Amendment, "it 'does not guarantee the right to [engage in the protected expression] at all times and places or in any manner that may be desired.' " *Kev*, 793 F.2d at 1058 (quoting *Heffron*

v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981)). Thus, a city, "when acting to further legitimate ends of the community, may impose incidental burdens" on this form of protected expression. *Kev*, 793 F.2d at 1058.

In *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), the Supreme Court held that municipalities may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are (1) justified without reference to the content of the regulated speech, (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information. *See also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S.Ct. 925, 928-29, 89 L.Ed.2d 29 (1986) ("[S]o called 'content neutral' time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.").

A. *Kent's Ordinance Is Content-Neutral Time, Place and Manner Restriction*

The Kent ordinance is a time, place and manner regulation because it does not ban erotic dancing altogether, but rather restricts such dancing to a location no closer than ten feet to any patron. *Renton*, 475 U.S. at 46, 106 S.Ct. at 928. *See also Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir.1987) (regulation was time, place, and manner regulation because it did not ban adult theaters altogether).

In determining whether the ordinance is content neutral, the principal inquiry "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791-93, 109 S.Ct. at 2753-55 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295, 104 S.Ct. 3065, 3070, 82 L.Ed.2d 221 (1984)). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* (citing *Renton*, 475 U.S. at 47-48, 106 S.Ct. at 928-29). "Regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech are properly characterized as content-neutral, as long as the regulations are justified without reference to the content of that speech." *Bamon Corp. v. City of Dayton*, 923 F.2d 470, 473 (6th Cir.1991) (citing *Boos v. Barry*, 485 U.S. 312, 320, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988)).

The content-neutrality requirement is met if the involved ordinance is "aimed to control secondary effects resulting from the protected expression" rather than at inhibiting the protected expression itself. *Tollis*, 827 F.2d at 1332. Thus, the court's initial determination in any action challenging the content-neutrality of an ordinance is "whether the 'predominate (sic) purpose in enacting the ordinance is suppression of first amendment rights' or, instead, the amelioration of deleterious secondary effects." *Id.* (quoting *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334 (9th Cir.1986)).

> If the ordinance is predominantly aimed at the suppression of first amendment rights, then it is

> content-based and presumptively violates the first amendment. *Renton*, 475 U.S. at 45-47, 106 S.Ct. at 928. If, on the other hand, the predominant purpose of the ordinance is the amelioration of secondary effects, then the ordinance is content-neutral and the court must then determine whether the ordinance passes constitutional muster as a content-neutral time, place, and manner regulation.

Id. A finding that the restriction of first amendment speech was "a motivating factor" in enacting the ordinance is not of itself sufficient to hold the regulation presumptively invalid. *Renton*, 475 U.S. at 47-49, 106 S.Ct. at 929.

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . "
>
> " . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."

Id. at 48, 106 S.Ct. at 929 (quoting *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672 (1968)).

Plaintiffs contend that the City of Kent's predominant intent in passing the Ordinance was to ban adult entertainment in the City of Kent, rather than to limit the secondary effects of such entertainment. Plaintiffs' contention is based on statements made by the mayor, city officials, and others; a pattern of the City adopting Ordinances as exotic dance studios were being proposed in

the City; and a history of imposing the most restrictive regulations possible on adult entertainment businesses.[2]

The defendant counters that in determining the predominant intent of the City in enacting the ordinance, the Court need not look any further than the language of the ordinance itself. The City contends that where the ordinance *by its terms* specifies that its purpose and intent is to eliminate deleterious secondary effects, it is content-neutral.

While it is true that most courts give great weight to the language of the ordinance and its stated purpose, at least one court has noted that "[t]his language [alone] might not save a statute that was formulated without specific attention to specific secondary effects." *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1259 (5th Cir.1992), *cert. denied*, 507 U.S. 1030, 113 S.Ct. 1845, 123 L.Ed.2d 469 (1993). The proper inquiry is to consider all "objective indicators [of intent] as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir.1984).

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[2] In support of their argument, plaintiffs submit the Declaration of R. Bruce McLaughlin, a land use planning and local government consultant, who concludes based on a review of the record that the City's goal in enacting the ordinance "was other than legitimate." McLaughlin Decl. at 23. McLaughlin's opinions do not constitute expert testimony under Fed.R.Evid. 702. McLaughlin has no specialized knowledge, skill, training, education, or experience that would qualify him to offer an opinion on the purpose of the ordinance. Moreover, his opinion is based on speculation and conjecture.

The Kent ordinance provides that its purpose and intent is:

> . . . to alleviate undesirable social problems that accompany adult entertainment businesses, and to enact content neutral regulations which address the secondary effects of adult entertainment businesses as well as health problems associated with such business, not to curtail the First Amendment expression, namely, dancing or entertainment.

KCC 5.10.020. While this language alone is insufficient to establish that the City's predominate [sic] intent was curbing secondary effects, the record reflects that the City had previously studied the secondary effects of adult entertainment and relied upon the results of those studies in formulating the ordinance. The City has concluded based on a review of its studies that regulation of the adult entertainment industry is necessary to prevent the significant criminal activity that has historically and regularly occurred in these establishments, including prostitution, narcotics and liquor law violations, and breaches of the peace. *See* Lubovich Affid. and attachments, Covey Affid.; KCC § 5.10.010(2). The City has also considered the potential adverse impact on property values resulting from these activities, and has taken steps to prevent to the extent possible a decline in property values. Lubovich Affid. and attachments.

Plaintiffs contend that the City's true, but hidden, intent in enacting the ordinance was different from what the ordinance states. They cite numerous statements by city officials and others which allegedly show that the City's predominant purpose in enacting the ordinance

was suppression of protected speech. Plaintiffs cite, for example, the following statement by City Attorney Roger Lubovich made on March 27, 1995, at a Planning Commission meeting:

> "Since we cannot zone these type[s] of businesses out the City, the licensing was looked at that was in place for this type of facility. . . . As indicated, these uses cannot be prohibited, but they can be regulated."

Plaintiffs' Opposition Memorandum (docket no. 27) at 6. Plaintiffs also cite a statement from the Chairman of the Planning Committee, made at a meeting on April 10, 1995:

> "With all the regulations we have adopted and stuff, I'm not too concerned that someone's going to come and try to open something up. *Because we've made it little bit difficult for them to make money in the traditional way they make money.*"

Id. (emphasis added).

Many of the statements cited by the plaintiffs reflect personal opinion or were in response to statements by constituents that they "don't want nude dancing in Kent." *See* McLaughlin Decl. at ¶ 27. *See also id.* at ¶ 32 ("It is my sincere hope that the stiff regulations that City Council has accepted regarding adult entertainment will cause the businessman to lose interest in developing here."); ¶ 33 (" . . . We've got one in the neighborhood, whether we like it or not. Hopefully he won't pick up his permit though."); ¶ 36 ("[if this ordinance holds up], nobody's going to want to come to this city."). Such

statements regarding individual motivation and viewpoint, some of which were made by individuals who were not on the city council and therefore had no ability to enact the ordinance, are precisely the types of statements that the Supreme Court held in Renton would not support a finding that the purpose of the regulation was suppression of protected speech. *See also Ambassador Books & Video v. City of Little Rock*, 20 F.3d 858, 862 (8th Cir.) (a handwritten statement by the city attorney that he "want[ed] to shut these places down!" somehow "[fell] far short of what would suffice to justify disregarding the plain and clear statement of the ordinance's purpose."), *cert. denied*, 513 U.S. 867, 115 S.Ct. 186, 130 L.Ed.2d 120 (1994).

Plaintiffs contend that the evidence of improper motive that they have submitted at a minimum creates a genuine issue of material fact on the issue of predominant intent, thereby precluding summary judgment on the question of content-neutrality. The Court concludes, however, that summary judgment on the issue of content-neutrality is appropriate here because the evidence plaintiffs rely upon is insufficient as a matter of law to establish improper intent.

"[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute" on the ground that "a punitive purpose in fact lay behind the statute." *Flemming*, 363 U.S. at 617, 80 S.Ct. at 1376. The evidence submitted by the plaintiffs here demonstrates only that certain City officials and others made negative statements about the prospects of having adult entertainment establishments in the City. These personal reflections and observations are insufficient to justify disregarding the

plain and clear statement of the ordinance's purpose and the balance of the record. *Renton*, 475 U.S. at 47-48, 106 S.Ct. at 928-29. As the Supreme Court has cautioned, "[j]udicial inquiries into [legislative] motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." *Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 1376, 4 L.Ed.2d 1435 (1960).

The Court concludes that the plaintiffs' evidence of individual motivation and viewpoint fails to raise a genuine issue of material fact on the question of predominant intent. The Court finds that the predominant intent of the City in enacting the ordinance was to prevent secondary effects, and thus the ordinance is content-neutral.

B. *Kent's Ordinance Is Narrowly Tailored to Serve a Substantial Governmental Interest, and Leaves Open Alternative Avenues of Expression*

"Curtailing public sexual contact and sexual criminal offenses represents a significant state interest." *BSA, Inc.*, 804 F.2d at 1111. Thus, ordinances regulating the distance between performers and patrons in adult entertainment establishments serve a substantial governmental purpose. *See Kev, Inc.*, 793 F.2d at 1061; *BSA, Inc.*, 804 F.2d at 1111. The plaintiffs do not dispute the City of Kent's substantial interest in curtailing sexual criminal offenses. Plaintiffs do contend, however, that the Ordinance is not narrowly tailored and unreasonably limits alternative avenues of communication.

In *Ward*, the Supreme Court held that the requirement of narrow tailoring is satisfied "so long as the

. . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." 491 U.S. at 798, 109 S.Ct. at 2758 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906-07, 86 L.Ed.2d 536 (1985)). *Ward* expressly rejected the argument that the government must choose the "least restrictive means" or the "least restrictive alternative" in order to satisfy the narrow tailoring requirement. *Id.* 491 U.S. at 798-99, 109 S.Ct. at 2757-58 ("Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."). The Court explained that provided "the means chosen are not substantially broader than necessary to achieve the government's interest, [ ] the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800, 109 S.Ct. at 2758. Thus, restrictions on time, place or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* at 797, 109 S.Ct. at 2757 (quoting *Albertini*, 472 U.S. at 689, 105 S.Ct. at 2906-07).

"Table dancing" is the performance of an erotic dance for one particular customer. Plaintiffs argue that table dancing is a unique form of expression that cannot be communicated if minimum distance requirements are imposed. According to plaintiffs, table dancing uses "not just vision but multi-sensory perception to communicate its message through the sounds, smells and movements

of the dancer within the [customer's] intimate perimeter." Plaintiffs' Supplemental Brief at 6. Plaintiffs emphasize in particular the importance of "scents," noting that "[t]he human body may produce some of the most powerful olfactory stimulants of all." *Id.* at 7. Because smell and intimacy are so important to the table dancing experience, plaintiffs argue, close physical distance between the dancer and the patron is essential.

Plaintiffs contend that the erotic dancing permitted by the ordinance is significantly less effective than table dancing in conveying the speaker's erotic message. They contend further that, based on the tipping practices of the nightclub's patrons, it is clear that customers do not view other erotic dancing, nude or otherwise, as an adequate substitute for table dancing. In short, customers tip better for table dancing. The restrictions on table dancing, they argue, will have a negative economic impact on adult nightclubs in Kent, and will make Kent a less attractive venue for this type of entertainment.[3] This, they argue, constitutes an impermissible suppression of protected speech.

As to the economic impact of the ordinance on the plaintiffs, the Ninth Circuit has held that "in the absence of any absolute bar to the market, . . . it is irrelevant whether '[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business.' " *Spokane Arcade, Inc. v. City of*

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[3] In support of this argument, plaintiffs submit evidence showing that similar ordinances in other cities have had a negative economic impact on adult nightclubs in those cities. *See* Bern Decl. (docket no. 33); Fueston Decl. (docket no. 28).

Spokane, 75 F.3d 663, 666 (9th Cir.1996) (quoting *Topanga Press Inc. v. City of Los Angeles*, 989 F.2d 1524, 1531 (9th Cir.1993), *cert. denied*, 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190 (1994)). The ordinance promulgated by the City in this case does not "deny [plaintiffs] the opportunity to operate its establishments, but merely (or rather, allegedly) increase[s] the costs of doing so." *Spokane Arcade* at 666 [sic]. This type of injury "should not inform First Amendment analysis." *Id.* Thus, "even if the costs of compliance were so great that [plaintiffs] would be forced out of business, the ordinance[ ] do[es] not pose any intrinsic limitation on the operation of the [nightclubs]." *Id.* at 667.

As to the [sic] whether the adverse impact of the ordinance on table dancing violates the First Amendment, the Court concludes it does not. Plaintiffs' argument hinges on the proposition that table dancing is so unique that it is entitled to its own separate constitutional analysis. As the Supreme Court stated in *Barnes*, however, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Barnes*, 501 U.S. at 570, 111 S.Ct. at 2462-63. The essential difference between table dancing and stage dancing is, in plaintiffs' own words, "close physical proximity." Thus, plaintiffs' argument, stripped of all its verbiage, is that the customer's experience is more intense, more personal, more erotic if the dancer is close. This is undoubtedly true, but the same could be said of stage dancing and other erotic dancing as a whole. Undoubtedly, the experience of the nightclub patron is significantly enhanced if he or she can be closer to the

nude dancer on stage. The patron can see and hear the dancer more clearly, and has a better opportunity to smell the "breath, perfume and the scent of the body." Plaintiffs' Supplemental Brief at 7. But there is nothing in constitutional jurisprudence to suggest that patrons are entitled under the First Amendment to the maximum erotic experience possible. The government is allowed to impose time, place, and manner restrictions on erotic expression, provided the regulation does not burden substantially more speech than necessary to further the government's legitimate interests. *Ward*, 491 U.S. at 799, 109 S.Ct. at 2758.

The Court accepts as true for purposes of this motion that many customers prefer to be close to the dancers. No doubt many would like to touch the dancers. But close proximity, while more desirable, also enhances the risk of illegal sexual contact, and thus courts have consistently upheld attempts by cities to minimize these risks by imposing distance requirements on erotic dancing. *See, e.g., Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir.1986); *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir.1986). Moreover, the customers' preferences are not the proper focus of the constitutional inquiry. As instructed by the Supreme Court, the crucial question is whether the distance requirement "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 798, 109 S.Ct. at 2758.

Plaintiffs argue that the distance requirement is not narrowly tailored because there are less restrictive means of achieving the same result. Plaintiffs argue, for example, that a "no touch" ordinance or one-foot setback would achieve the same result in a less burdensome

manner. But the Supreme Court has flatly rejected the notion that time, place, and manner restrictions violate the First Amendment "simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689, 105 S.Ct. at 2906. " 'The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted." *Ward*, 491 U.S. at 800, 109 S.Ct. at 2758 (*quoting Albertini*, 472 U.S. at 689, 105 S.Ct. at 2906-07).

The Court is satisfied that the City has a substantial interest in reducing the risk of sexual contact and illegal touching between dancers and their patrons. The Court is also satisfied that the reasonable distance requirement effectively serves that interest.

The remaining question is whether the ordinance burdens "*substantially* more speech than necessary to further the government's interest." *Ward*, 491 U.S. at 799, 109 S.Ct. at 2758 (emphasis added). The plaintiffs' argument that it does is again premised on their belief that there are less restrictive means to achieve the government's goal. That argument must be rejected in light of Ward. Moreover, the argument that a ten-foot distance requirement between dancer and patron burdens substantially more speech than necessary is essentially foreclosed by *Kev*. As the Ninth Circuit stated in *Kev*:

> While the dancers' erotic message might be slightly less effective from ten feet, the ability to

> engage in protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market.

793 F.2d at 1061.[4]

Here, the ordinance does not prevent the dancers from performing their erotic dance, or limit the manner in which the dancers may express themselves. The ordinance merely requires that the dancer perform the dance at a certain distance from the customer. Nor does the ordinance bar the customer from receiving the erotic message being conveyed. There is no suggestion that, at a distance of ten feet, the customer is unable to see the performance, appreciate its meaning, or satisfy his or her appetite for sexually explicit dance. The ordinance merely diminishes to a limited degree the effectiveness of the erotic message conveyed by the dance; it "does not impair the dancer's ability to display her art." *Kev*, 793 F.2d at 1061 n. 12. As a result, the ordinance does not burden substantially more speech than necessary, and thus is "narrowly tailored" within the meaning of *Ward*. Based on the same reasoning, the Court finds that the

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[4] The Court notes that *Kev* was decided before he [sic] Supreme Court in *Ward* clarified that content-neutral time, place, and manner restrictions need not be the least restrictive or least intrusive means of achieving the government's goals. The Court did recognize, however, the Supreme Court's holding in *Albertini* that the requirement that an "incidental burden on speech [be] no greater than essential" is met where "the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Kev*, 793 F.2d at 1059 n. 3. This is the test later adopted by the Supreme Court in *Ward*. Under this test, the *Kev* court found the ten-foot distance requirement to be constitutional.

ordinance reasonably offers alternative avenues for expression through erotic dance, and thus is a valid time, place, and manner restriction.

The plaintiffs also argue that the ordinance violates the First Amendment because it is overbroad. The Court rejects this argument as without merit. The Court also rejects as meritless the plaintiffs' claim that the ordinance violates their substantive due process rights. There is no basis for finding that the ordinance is arbitrary, capricious, or irrational, or that it is unduly oppressive.

III. *State Constitutional Law Claims*

The Court abstains from ruling on the plaintiffs' state constitutional claims, and hereby dismisses them without prejudice.

IV. *Conclusion*

The Court hereby GRANTS the City of Kent's motion for summary judgment and dismisses all of the plaintiffs' federal law claims with prejudice. The Court dismisses the plaintiffs' state law claims without prejudice. The Clerk is directed to enter judgment in favor of the defendant on the plaintiffs' federal law claims.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK COLACURCIO, JR., dba DDF&S Investment Co.; DAVID EBERT, dba DDF&S Investment Co.; STEVE FUESTON, dba DDF&S Investment Co., Plaintiffs-Appellants, v. CITY OF KENT, Defendant-Appellee.	No. 96-36197 D.C. No. CV-95-01176-TSZ ORDER (Filed Mar. 26, 1999)

Before: HUG, Chief Judge, REINHARDT and WIGGINS, Circuit Judges.

Chief Judge Hug and Judge Wiggins vote to deny the petition for rehearing. Judge Reinhardt votes to grant the petition for rehearing. Chief Judge Hug and Judge Reinhardt vote to reject the suggestion for rehearing en banc. Judge Wiggins recommends rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX D

CHAPTER 5.10. ADULT ENTERTAINMENT

Sec. 5.10.010. Findings of fact.

Based on public testimony and other evidence and information before it, the city council makes the following findings of fact:

1. The activities defined and regulated in this chapter are detrimental to the public health, safety and general welfare of the citizens of the city and, therefore, such activities must be regulated as provided in this chapter.

2. Regulation of the adult entertainment industry is necessary because, in the absence of such regulation, significant criminal activity has historically and regularly occurred. This history of criminal activity in the adult entertainment industry has included prostitution, narcotics and liquor law violations, breaches of the peace and the presence within the industry of individuals with hidden ownership interests and outstanding arrest warrants.

3. Contact between entertainers and patrons of adult entertainment businesses facilitates prostitution and other related crimes and the concern over unlawful sexual activities and related crimes is a legitimate health concern of the city which demands reasonable regulation of adult entertainment businesses in order to protect the health and well-being of the citizens; and

4. Licensing is a legitimate and reasonable means of accountability to ensure that operators of adult entertainment businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation; and

5. In the absence of regulation, the activities described in this section occur regardless of whether the adult entertainment is presented in conjunction with the sale of alcoholic beverages.

6. It is necessary to license entertainers in the adult entertainment industry to prevent the exploitation of minors, to ensure that each such entertainer is an adult, to ensure that such entertainers have not assumed a false name which would make regulation of the entertainer difficult or impossible and to ensure that such entertainers are not involved in criminal activity.

7. It is necessary to have a licensed manager on the premises of establishments offering adult entertainment at such times as such establishments are offering adult entertainment so that there will, at all necessary times, be an individual responsible for the overall operation of the establishment, including the actions of patrons, entertainers and other employees.

8. The license fees required in this chapter are nominal fees imposed as necessary regulatory measures designed to help defray the substantial expenses incurred by the city in

regulating the adult entertainment industry.

9. Hidden ownership interests for the purposes of skimming profits and avoiding the payment of taxes have historically occurred in the adult entertainment industry in the absence of regulation. These hidden ownership interests have historically been held by organized and white collar crime elements. In order for the city to effectively protect the public health, safety and general welfare of its citizenry, it is important that the city be fully apprised of the actual ownership of adult entertainment establishments.

10. The city council desires to prevent these adverse effects and thereby protect the health, safety, and welfare of the citizenry, protect the citizens from increased crime, preserve the quality of life, preserve the property values and character of surrounding neighborhoods; and deter the spread of urban blight; and

11. It is not the intent of this chapter to suppress any speech activities protected by the First Amendment or Article I, Section 5 of the Washington State Constitution, but to enact content neutral regulations which address the secondary effects of adult entertainment businesses, as well as the health problems associated with such businesses.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.020. Purpose and intent.

It is the purpose of this chapter to regulate adult entertainment businesses and related activities to promote health, safety, morals, and general welfare of the citizens of the City of Kent, and to establish reasonable and uniform regulations to prevent the establishment of adult entertainment business in locations within the city which would have a harmful effect on the residents of the city. The purpose of this chapter is to alleviate undesirable social problems that accompany adult entertainment businesses, and to enact content neutral regulations which address the secondary effects of adult entertainment businesses as well as health problems associated with such business, not to curtail the First Amendment expression, namely dancing or entertainment. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the state or federal constitutions, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this chapter to condone or legitimate the distribution of obscene materials.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.030. Definitions.

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them

in this section, except where the context clearly indicates a different meaning:

Adult entertainment means any dance, amusement, show, display, exhibition, pantomime, modeling or any other like performance of any type where such is characterized by the performer's "nudity", as defined herein, or the exhibition of "specified sexual activities," also defined herein, which emphasizes and seeks to arouse or excite the patron's sexual desires for the use or benefit of a member or members of the public or advertised for the use or benefit of a member of the public.

Adult entertainment business means an adult arcade, adult bookstore, adult novelty store, adult video store, adult motion picture theater, and exotic dance studio, more specifically defined as follows:

1. *Adult arcade* means an establishment where, for any form of consideration, one (1) or more still or motion picture projectors, slide projectors, computer generated or enhanced pornography, panorama, peep show, or similar machines, or other image producing machines, for personal viewing, are used to show films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "nudity," or "specified sexual activities."

2. *Adult bookstore, adult novelty store or adult video store* means a commercial establishment which has as a significant or substantial portion of its stock-in-trade or revenues, substantial meaning twenty (20)

percent or more, for any form of consideration, books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, or other photographic reproductions or visual representations which are characterized by the depiction or description of "nudity" or "specified sexual activities."

a. An establishment may have other principal business purposes that do not involve the offering for sale or rental of materials depicting or describing "nudity" or "specified sexual activities," and still be categorized as adult bookstore, adult novelty store, or adult video store, such other business purposes will not serve to exempt such establishments from being categorized as an adult bookstore, adult novelty store, or adult video store so long as one (1) of its principal business purposes is offering for sale or rental, for some form of consideration, the specified materials which depict or describe "nudity" or "specified sexual activities."

b. Video stores that sell and/or rent only video tapes or other photographic reproductions and associated equipment shall come within this definition. It shall be a rebuttable presumption that twenty (20) percent of a business stock-in-trade or revenues is considered substantial.

3. *Adult motion picture theater* means a commercial establishment where films, motion

pictures, video cassettes, slides, or similar photographic reproductions characterized by the depiction or description of "nudity" or "specified sexual activities" are regularly shown for any form of consideration.

4. *Exotic dance studio,* also known as "topless bar" and "adult cabaret," means a nightclub, bar, restaurant, or similar commercial establishment to which any member of the public is invited or admitted and where an entertainer provides live adult entertainment performances to any member of the public.

City means the City of Kent, Washington.

Clerk means such city employees or agents as the mayor shall designate to administer this chapter, or any designee thereof.

Conviction means an adjudication of conviction of guilt and occurs at such time as a plea of guilty has been accepted or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-fact finding motions, and appeals. Conviction also means a bail forfeiture.

Employee means any and all persons, including managers, entertainers, and independent contractors who work in or at or render any services directly related to the operation of any adult entertainment business offering adult entertainment, whether or not such person is paid compensation by the operator of said business.

Entertainer means any person who provides live adult entertainment in an adult entertainment business

whether or not an employee of the operator and whether or not a fee is charged or accepted for such entertainment.

Establish means and include any of the following:

1. To open or commence any adult entertainment business as a new business; or
2. To convert an existing business, whether or not an adult entertainment business, to any adult entertainment businesses defined herein.
3. To add any of the adult entertainment businesses defined herein to any other existing adult entertainment business; or
4. To relocate any such adult entertainment business.

License means a license to operate, manage or entertain at any premises that is classified as an adult entertainment business.

Licensed premises means any premises that requires a license and that is classified as an adult entertainment business.

Licensee means a person in whose name a license to operate, manage or entertain at an adult entertainment business has been issued, as well as the individual listed as an applicant on the application for a license.

Manager means any person appointed by an owner or operator of an adult entertainment business who manages, directs, administers or is in charge of the affairs and/or the conduct or operation of an adult entertainment business and includes assistant managers.

Materially false representation means any false representation or statement, oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the license application process.

Nude means:

1. Less than completely and opaquely covered or in such attire, costume or clothing as to expose to view male genitals, female genitals, pubic region, buttocks, anus, or any portion of the female breast below a point immediately above the top of areolae; or

2. Wearing any device or covering exposed to view which simulates the appearance of male genitals, female genitals, pubic region, buttocks, anus, or any portion of the female breast below a point immediately above the top of areolae.

Operator means and includes the owner, permit holder, custodian, manager, operator, or person in charge of, conducting or maintaining an adult entertainment business.

Panorama or peep show means any device which, upon insertion of a coin or by any other means, exhibits or displays a picture or view by film, video, or by any other means.

Person means any individual, firm, joint venture, copartnership, association, social club, fraternal organization, corporation, estate, trust business trust, receive or any other group or combination acting as a unit.

Specified sexual activities means and includes any of the following:

1. The caressing, touching, fondling or other intentional or erotic touching of male genitals, female genitals, pubic region, buttocks, anus, or female breasts; or

2. Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, flagellation, sodomy, bestiality, or any sexual acts which are prohibited by law; or

3. Masturbation, actual or simulated; or

4. Human genitals in a state of sexual stimulation, arousal or tumescence or visual state of sexual stimulation, arousal or tumescence, even if completely and opaquely covered; or

5. Excretory functions as part of or in connection with any of the activities set forth in subsections 1. through 4. of this subsection.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.040. Administration of licensing.

The clerk is responsible for granting, denying, revoking, renewing, suspending, and cancelling adult entertainment business licenses. The planning director and the building official or their designee are responsible for ascertaining whether a proposed adult entertainment business for which a license is being applied for complies with all building code and land use requirements enumerated herein and all other applicable building code

and zoning laws and/or regulations now in effect or as amended or enacted subsequent to the effective date of this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.050. License required; fee

A. *Adult entertainment business license required.*

1. No person or entity shall use any property or premises for an adult entertainment business within the City of Kent except within those areas authorized for location of said businesses as set forth in Kent City Code 15.08.270, and no adult entertainment business shall be established, operated or maintained in the city unless the owner or operator thereof has obtained an adult entertainment business license from the clerk. It is unlawful for any entertainer, employee or operator to knowingly work in or about or to knowingly perform any service directly related to the operation of an unlicensed public adult entertainment business.

   Violation/penalty. Any violation of the provisions of this subsection shall constitute a misdemeanor as set forth in this chapter.

2. The annual fee for an exotic dance studio business license shall be five hundred dollars ($500.00). This amount shall be used for the cost of administration of this chapter.

3. The annual license fee for all other adult entertainment businesses subject to this

chapter shall be one hundred fifty dollars ($150.00). This amount shall be used for the cost of administration of this chapter.

4. The above-referenced licenses expire annually on December 31 and must be renewed by January 1.

5. The applicant must be eighteen (18) years of age or older.

B. *License for managers and entertainers required.*

1. No person shall work as a manager, assistant manager, or entertainer at an adult entertainment business without having first obtained a manager's or an entertainer's license from the clerk.

   Violation/penalty. It shall be unlawful and a person commits a misdemeanor as set forth in this chapter if he or she acts or performs as a manager or entertainer in an adult entertainment business without said valid and current license.

2. The annual fee for such a license shall be one hundred fifty dollars ($150.00). This amount shall be used for the cost of administration of this chapter.

3. This license expires annually on December 31 and must be renewed by January 1.

4. The applicant must be eighteen (18) years of age or older.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.060. License applications.

A. *Adult entertainment business.* All applications for an adult entertainment business license for places which offer adult entertainment shall be submitted in the name of the person or entity proposing to conduct such adult entertainment on the business premises. All applications for an adult entertainment business license shall be signed by the applicant and notarized or certified to be true under penalty of perjury. All applications shall be submitted on a form supplied by the city, along with a nonrefundable application processing fee of one hundred fifty dollars ($150.00), which shall contain the following information:

1. Names, any aliases or previous names, driver's license number, if any, business, mailing, and residential address, telephone number, and social security numbers for each individual, partner, corporate officer, director, and other persons holding a significant interest or responsibility for management of the business, specifying the interest or management responsibility of each such individual, partner, corporate officer and/or director for each applicant. For purposes of this section, significant interest shall mean those persons who own ten (10) percent or greater interest in the adult entertainment business.

2. If a partnership, whether general or limited; and if a corporation, date and place of incorporation, evidence that it is in good standing under the laws of Washington, and name and address of any registered agent for service of process.

3. Addresses of the applicant for the five (5) years immediately prior to the date of application.

4. Any and all criminal misdemeanor or felony convictions or forfeitures, other than parking offenses or minor traffic violations, including dates of conviction, nature of the crime, name and location of court and disposition for each individual, partner, corporate officer and/or director identified in subparagraph 1. above.

5. A description of the business, occupation, or employment of the applicant for the three (3) years immediately preceding the date of application.

6. Whether the applicant or any individual, partner, corporate officer, or director identified in subparagraph 1. above has had a previous license under this chapter or other similar ordinances from another city or county denied, suspended, or revoked, including the name and location of the adult entertainment business for which the license was denied, suspended, or revoked, as well as the date of the denial, suspension, or revocation.

7. Whether the applicant or any individual, partner, corporate officer, or director identified in subparagraph 1. above holds any other licenses under this chapter, or other similar adult entertainment business ordinance from another city or county and, if so, the names and locations of such other permitted businesses.

8. The single classification of license for which the applicant is filing.

9. The location of the proposed adult entertainment business, including a legal description of the property, street address, and telephone number(s), if any, together with the name and address of each owner and lessee of the property.

10. Two (2) two-inch by two-inch color photographs of each applicant, taken within six (6) months of the date of the application, showing only the full face of the applicant. The photographs shall be provided at the applicant's expense. Alternatively, the applicant may be required to submit to a photograph taken at the direction of the clerk.

11. Complete sets of fingerprints of each individual, partner, corporate officer, and director on forms prescribed by the chief of police.

12. In the case of an exotic dance studio, a scale drawing or diagram showing the configuration of the premises for the proposed exotic dance studio, including a statement of the total floor space occupied by the business, and marked dimensions of the interior of the premises. Performance areas, seating areas, manager's office and stations, restrooms and service areas shall be clearly marked on the drawing. An application for a license for an exotic dance studio shall include building plans which demonstrate conformance with Kent's Building and Zoning Codes.

13. Authorization for the city, its agents and employees to investigate and seek information to confirm any statements set forth in the application.

14. Supplemental identification and/or information, as requested by the clerk, deemed necessary to confirm statements set forth in the application or determine compliance with this chapter.

B. *Processing adult entertainment business license applications.*

1. Upon receipt of the complete application and fee, the clerk shall provide copies to the police, planning and other applicable departments for their investigation and review to determine compliance of the proposed adult entertainment business with the laws and regulations which each department administers. Each department shall, within thirty (30) days, report to the clerk whether such application and premises complies with the laws administered by each department. No license may be issued unless each department reports that the application and premises comply with the relevant laws. A department shall recommend denial of a license under this subsection if it finds that the proposed adult entertainment business is not in conformance with the requirements of any provisions of any applicable statute, code, ordinance, regulation or other law in effect in the city. A recommendation for denial shall be in writing and cite the specific reasons therefor, including applicable laws.

2. An adult entertainment business license shall be issued by the clerk within thirty (30) days of the date of filing a complete license application and fee, unless the clerk determines that the applicant has failed to meet any of the requirements of this chapter or provide any information required under this subsection, or that the applicant has made a false misleading or fraudulent statement of material fact on the application for a license, or in any report or records required to be filed with the clerk. In the event the clerk determines or learns at any time that the applicant has improperly completed the application for a proposed adult entertainment business license, he/she may grant an extension of time in which to supply the required information. (The time period for granting or denying a permit shall be stayed during the period in which the applicant is allowed an opportunity to properly complete the application.) If the clerk finds that the applicant has failed to meet any of the requirements for issuance of an adult entertainment license, the clerk shall deny the application in writing, and shall cite, in writing, the specific reasons therefor, including applicable laws. If the clerk fails to issue or deny the application within thirty (30) days of the date of filing of a complete application and fee, the applicant may, subject to all other applicable laws, operate the business for which the license was sought until notified by the clerk that the license has been denied.

C. *Manager or entertainer license.* A separate license shall be obtained for each and every establishment at which the manager applicant will manage or the entertainer applicant will entertain. All applications for a manager's or entertainer's license shall be signed by the applicant and notarized or certified to be true under penalty of perjury. All applications shall be submitted on a form supplied by the city, along with a nonrefundable application processing fee of one hundred dollars ($100.00), which shall contain the following information:

1. The applicant's name, home address, home telephone number, date and place of birth, driver's license number, if any, social security number and for entertainers, any stage names or nicknames used in entertaining.

2. The name and address of each business at which the applicant intends to work.

3. Documentation that the applicant has attained the age of eighteen (18) years. Any of the following shall be accepted as documentation of age:

    a. A motor vehicle operator's license issued by any state bearing the applicant's photograph and date of birth; or

    b. A state issued identification card bearing the applicant's photograph and date of birth.

    c. An official passport issued by the United States of America.

    d. An immigration card issued by the United States of America.

e. Any other picture identification that the city determines to be acceptable.

4. A complete statement of all convictions of the applicant for any misdemeanor or felony violations in this or any other city, county or state, except parking violations or minor traffic infractions.

5. A description of the applicant's principal activities or service to be rendered.

6. Resident addresses and telephone numbers for five (5) years immediately prior to the date of application specifying the period of residence at each address.

7. The names and addresses of employers or individuals or businesses for whom the applicant was an employee or independent contractor for the three-year period immediately prior to the date of application, including the period of employment.

8. Two (2) two-inch by two-inch color photographs of each applicant, taken within six (6) months of the date of the application, showing only the full face of the applicant. The photographs shall be provided at the applicant's expense. Alternatively, the applicant may be required to submit to a photograph taken at the direction of the clerk.

9. Complete sets of fingerprints of each manager and entertainer on forms prescribed by the chief of police.

10. Authorization for the city, its agents and employees to investigate and seek information to confirm any statements set forth in the application.

11. Supplemental identification and/or information, as requested by the clerk, deemed necessary to confirm any information set forth in the application or to determine compliance with this chapter.

D. *Processing managers or entertainers license applications.* A copy of the application shall be provided to the police and other applicable departments for its review, investigation and recommendation. An adult entertainment business manager's or an adult entertainer's license shall be issued by the clerk within fourteen (14) days from the date the complete application and fee were received unless the clerk determines that the applicant has failed to provide any information required to be supplied according to this chapter, or that the applicant has made any false, misleading or fraudulent statement of material fact in the application for a license. In the event the clerk determines or learns at any time that the applicant has improperly completed the application for issuance of a managers or entertainers license, he/she may grant an extension of time in which to supply the required information. (The time period for granting or denying a license shall be stayed during the period in which the applicant is allowed an opportunity to properly complete the applicant.) If the clerk determines that the applicant has failed to meet any of the requirements for issuance of a managers or entertainers license, the clerk shall deny the application in writing and shall cite

the specific reasons therefor, including applicable laws. An applicant for an adult entertainment manager's or entertainer's license shall be issued a temporary license upon receipt of a complete license application and fee. Said temporary license will automatically expire on the fourteenth day (or on such day established pursuant to any extension granted herein) following the filing of a complete application and fee, unless the clerk has failed to approve or deny the license application, in which case the temporary license shall be valid until the clerk approves or denies the application, or until the final determination of any appeal from a denial of the application.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.070. Issuance of licenses.

Upon completion of the investigation and review by the departments, a review of the recommendations and verifications, and a determination that all matters contained in the application are true and correct and that this chapter has been complied with, the clerk shall issue such license applied for in accordance with the provisions of this chapter. The applicable license fee, together with any delinquent fees that may then be due shall first be paid to the city.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.080. Denial of application for licenses.

The clerk shall deny the application to:

1. An applicant who is under eighteen (18) years of age.

2. An applicant who is overdue on his/her payment to the city of taxes, fees, fines, or penalties assessed against him/her or imposed upon him/her in relation to an adult entertainment business.

3. An applicant whose place of business is conducted by an agent, unless such agent possesses the same qualifications required of the licensee, or in the case of a manager of an adult entertainment business, the manager has obtained a manager's license.

4. A partnership, unless all the members thereof are qualified to obtain a license as provided in this chapter. Such license shall be issued to the manager or agent of said partnership.

5. A corporation, unless all the officers and directors thereof are qualified to obtain a license as provided herein. Such license shall be issued to the manager or agent of said corporation.

6. An applicant who has failed to provide information required on a license application for the issuance of the license or has made, with the intent to mislead, a materially false representation in the application for a license under this chapter which the applicant knows to be false.

7. The applicant has failed to comply with any provision or requirement of this chapter.

8. An applicant having an interest in any license granted under this chapter revoked within six (6) months from the date of application.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.090. License term; renewals.

A. There shall be no prorating of the license fees for licenses required pursuant to this chapter, and all such licenses shall expire on the thirty-first day of December of each year, except that in the event that the original application is made subsequent to June 30, then one-half of the annual fee may be accepted for the remainder of said year.

B. Application for renewal of licenses issued hereunder shall be made to the clerk no later than thirty (30) days prior to the expiration of adult entertainment business licenses and managers and entertainers business licenses. The renewal license shall be issued in the same manner an on payment of the same fees as for an original application under his [sic] chapter. All applicants for a license renewal shall present their current license for verification of identity, and upon issuance of a renewed license, shall surrender the expiring license to the clerk. There shall be assessed and collected by the clerk, an additional charge of twenty-five (25) percent of the license fee, on applications not made on or before said date.

C. The clerk shall renew a license upon application unless the clerk is aware of facts that would disqualify the applicant from being issued the license for which he or she seeks renewal, and further provided that the application complies with all provisions of this chapter as now enacted or as the same may hereafter be amended.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.100. Other license requirements.

A. *Duty to supplement.*

1. Applicants for a license under this chapter shall have a continuing duty to promptly supplement application information required in the event that said information changes in any way from what is stated on the application. If any person or entity acquired, subsequent to the issuance of an adult entertainment business license for places offering adult entertainment, an interest in the licensed premises or the licensed business, immediate notice of such acquisition shall be provided in writing to the clerk. The notice shall include the information required to be provided for the original adult entertainment business. The failure to supplement the application on file with the clerk regarding such change in ownership or interest, within thirty (30) days from the date of such change, shall be grounds for suspension or revocation of a license.

2. The applicant must be qualified according to the provisions of this section and the premises must be inspected and found to be in

compliance with health, fire, and building codes of the city.

3. The fact that a person possesses other types of state or city permits and/or licenses does not exempt him/her from the requirement of obtaining an adult entertainment business.

B. *Manager on premises.* A licensed manager shall be on duty on tee [sic] premises of an adult business at all times that adult entertainment is being provided.

C. *License nontransferable.* No license or permit issued pursuant to this chapter shall be assignable or transferable. For purposes of this, chapter, "assignable" or "transferable" shall mean and include any of the following:

1. The sale, lease or sublease of the business; or

2. The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

3. The establishment of a trust, gift or other similar legal devise which transfers the ownership or control of the business, except for transfer by bequest or other operation of law.

D. *Name of business and place of business.* No person granted a license pursuant to this chapter shall operate the adult entertainment business under a name not specified in the license, nor shall he or she conduct business under any designation or location not specified in the license.

E. *License; posting and display.*

1. The adult entertainment business license, if granted, shall state on its face the name of the person or persons to whom it is issued, the expiration date, and the address of the licensed adult entertainment business. The license shall be posted in a conspicuous place at or near the entrance to the licensed premises so that it can be easily read at any time the business is open.

2. The license of the manager on duty shall be prominently posted during business hours.

3. Entertainer licenses need not be posted, but must be available on the premises when the entertainer is on the premises, for immediate inspection by any city official or law enforcement agency having jurisdiction.

4. Violation/penalty. Any violation of the provisions of this subsection is a misdemeanor as set forth in this chapter.

F. *Inspection of licenses.* The manager shall, upon request by any law enforcement officer or inspector, make available for inspection the entertainer licenses required to be on the premises as described herein.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.110. Specifications; exotic dance studios.

A. *Separation of adult entertainment performance area.* The portion of the exotic dance studio premises in which dancing and adult entertainment by an entertainer is performed shall be a stage or platform at least twenty-

four (24) inches in elevation above the level of the patron seating areas. The stage(s) must be visible from the common areas of the premises and at least one (1) manager's station.

B. *Lighting.* Sufficient lighting shall be provided and equally distributed in and about the parts of the premises which are open to and used by patrons so that all objects are plainly visible at all times, and shall be illuminated so that patrons, on any part of the premises open to the public, shall be able to read a program, menu, or list printed in eight (8) point type.

C. *Visibility.* Neither the performance nor any photograph, drawing, sketch or other pictorial or graphic representation thereof displaying nudity may be visible outside the premises of the adult entertainment business.

D. *Submittal of plans.* Building plans showing conformance with the requirements of this section shall be included with any application for an exotic dance studio business license.

E. *Signs.* Signs of sufficient size to be readable at twenty (20) feet shall be conspicuously displayed in the public area of the establishment stating the following:

THIS ADULT ENTERTAINMENT ESTABLISHMENT IS REGULATED BY THE CITY OF KENT. ENTERTAINERS ARE:

(A) Not permitted to engage in any type of sexual conduct;

(B) Not permitted to appear nude, except on stage;

(C) Not permitted to solicit or demand or to directly accept, or receive any gratuity or other payment from a patron.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.120. Standards of conduct and operation applicable to exotic dance studios.

A. *Standards for patrons, employees and entertainers.* The following standards of conduct must be adhered to by patrons, entertainers and/or employees of exotic dance studios at all times adult entertainment is performed.

1. Admission to exotic dance studios under this section shall be restricted to persons of the age of eighteen (18) years or more.

2. All dancing and adult entertainment by an entertainer shall occur on the entertainment performance areas intended for that purpose described in section 5.10.110 A.

3. No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron.

4. No patron or customer shall go into or upon the adult entertainment performance area described in section 5.10.110 A. above while adult entertainment is being performed.

5. No employee or entertainer shall be nude or shall entertain while nude except on the entertainment performance area described in subsection 5.10.110 A.

6. No member of the public or employee or entertainer shall allow, encourage, or knowingly permit any person upon the premises to touch, caress, or fondle the breast, buttocks, anus, pubic area, or genitals of any other person.

7. No member of the public or employee or entertainer shall allow, encourage, or permit physical contact between an employee or entertainer and any member of the public, which contact is intended to arouse or excite sexual desires.

8. No employee or entertainer shall perform acts in a lewd or obscene fashion or perform acts of or acts which simulate:

   a. Specified sexual activities as defined in this chapter; or

   b. The touching, caressing or fondling of the breasts, buttocks or genitals.

9. No entertainer employed or otherwise working at an exotic dance studio shall solicit any gratuity or other payment from a patron or customer.

10. No customer or patron of an adult entertainment business shall directly pay or give any gratuity or other payment to any entertainer.

11. It is unlawful for any entertainer, manager, employee, or wait person to perform more than (1) such function at an exotic dance studios [sic] on the same business day.

12. It is unlawful for any entertainer to use any stage name or nickname not listed in the application for entertainers license.

13. No exotic dance studio licensee shall employ as an entertainer a person under the age of eighteen (18) years or a person not licensed pursuant to this chapter.

14. No exotic dance studio licensee shall service, sell, distribute, or suffer the consumption or possession of any intoxicating liquor or controlled substance upon the premises of the licensee.

B. The responsibilities of the manager of an exotic dance studio shall include but are not limited to:

1. A licensed manager shall be on duty at an exotic dance studio at all times adult entertainment is being provided or members of the public are present on the premises. The name and license of the manager shall be prominently posted during business hours. Managers shall be required to verify and ensure that entertainers possess a current and valid entertainer license availabe for immediate inspection on the premises.

2. The licensed manager on duty shall not be an entertainer.

3. The manager licensed under this chapter shall maintain visual observation of each member of the public at all times any entertainer is present in the public or performance area of the exotic dance studio. Where there is more than one (1) performance area, or the performance area is of such size or configuration that one (1) manager or assistant manager is unable to visually observe, at all times, each adult entertainer, each employee, and each member of the public, a manager or assistant

manager licensed under this chapter shall be provided for each public or performance area or portion of a public or performance are a visually separated from other portions of the exotic dance studio.

4. The manager shall be responsible for and shall assure that the actions of members of the public, the adult entertainers and all other employees shall comply with the dress code and conduct set forth in section 5.10.120 and all other requirements of this chapter.

C. Violation/penalty. Any violation of the provisions of this section by a patron, owner, operator, manager, or any employee is a misdemeanor as set forth in this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.130. Regulations applicable to adult arcades.

All adult arcades shall comply with the following additional regulations:

1. *Construction/maintenance.*

   a. The interior of the show premises shall be arranged in such a manner as to insure that customers are fully visible from the waist down, and all persons viewing such panorama pictures shall be visible from the common areas of such premises.

   b. The licensee shall not permit any doors to public areas on the premises to be locked during business hours.

c. Any room or area on such premises shall be readily accessible at all times for inspection by any law enforcement officer or license inspector.

d. The licensee shall maintain, at a minimum, illumination as required in this chapter for exotic dance studios generally distributed in all parts of the premises at all times when the facility is open or when the public is permitted to enter or remain therein.

2. *Standards of conduct.*

a. No patron shall be unclothed or in such attire, costume or clothing so as to be in a state of nudity or engage in any specified sexual activity and no owner or manager shall knowingly allow such conduct.

b. No more than one (1) patron at a time shall be present in a booth, cubicle, room, or stall wherein adult entertainment is provided is visible.

c. Violation/penalty. Any violation of the provisions of this subsection by a patron, owner, operator, manager, or any employee is a misdemeanor as set forth in this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.140. Regulations applicable to book stores, video stores and other businesses not qualifying as adult entertainment businesses.

A. Book stores, video stores, and other businesses that sell or otherwise distribute books, magazines, films, motion pictures, video cassettes, slides, or other visual representations which are characterized by the depiction or description of nudity or specified sexual activities, and less than twenty (20) percent of their stock-in-trade or revenues comes from the rental or sale of such items shall be subject to the following regulations:

1. All such items as are described above shall be physically segregated and closed off from other portions of the store such that these items are not visible and/or accessible from other portions of the store.

2. No advertising for such items, shall be posted or otherwise visible, except where such items are authorized for display.

3. Signs readable at a distance of twenty (20) feet shall be posted at the entrance to the area where such items are displayed stating that persons under the age of eighteen (18) are not allowed access to the area where such items are displayed.

4. The manager or attendant shall take responsible steps to monitor the area where such items are displayed to insure that persons under eighteen (18) years of age do not access the age-restricted area.

5. Employees of such businesses shall check identification of persons appearing to be

eighteen (18) or under to insure that such items are not rented or sold to persons under the age of eighteen (18).

B. Violation/penalty. Rental or sale of obscene material (as defined by state law) or material harmful to minors (as defined by state law) to persons under eighteen (18) years of age is prohibited. Any violation of the provisions of this subsection by an owner, operator or manager of an adult entertainment business is a misdemeanor as set forth in this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.150. Exemptions.

A. This chapter shall not be construed to prohibit:

1. Plays, operas, musicals, or other dramatic works which are not obscene;

2. Classes, seminars and lectures held for serious scientific or educational purposes; or

3. Exhibitions or dances which are not obscene.

B. For purposes of this chapter, an activity is obscene if:

1. Taken as a whole by an average person applying contemporary community standards the activity appeals to a prurient interest in sex;

2. The activity depicts patently offensive representations according to city community standards of:

   a. Ultimate sexual acts, normal or perverted, actual or simulated; or

b. Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

3. The activity taken as a whole lacks serious literary, artistic, political, or scientific value.

C. For purposes of this chapter, an activity is dramatic if the activity is of, related to, devoted to, or concerned specifically or professionally with current drama or the contemporary theater.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.160. Record keeping requirements.

A. All licenses, papers, records, and things required to be kept pursuant to this chapter shall be open to inspection by the clerk during the hours when the licensed premises are open for business, upon two (2) days' written notice. The purpose of such inspections shall be to determine whether the licenses, papers, and things meet the requirements of this chapter.

B. Each adult entertainment business shall maintain and retain for a period of two (2) years the name, address, and age of each person employed or otherwise retained or allowed to perform on the premises as an adult entertainer, including independent contractors and employees. This information shall be open to inspection by the clerk during hours of operation of the business upon twenty-four (24) hours notice to the licensee.

C. No later than March 1 of each year an erotic dance studio licensee shall file a verified report with the clerk showing the licensee's gross receipts and amounts paid to entertainers for the preceding calendar year.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.170 Inspections.

In order to insure compliance with this chapter, all areas of licensed adult entertainment businesses which are open to members of the public shall be open to inspection by city agents and employees during the hours when the premises are open for business. The purpose of such inspections shall be to determine if the licensed premises are operated in accordance with the requirements of this chapter. It is hereby expressly declared that unannounced inspections are necessary to insure compliance with this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.180. Hours of operation.

It is unlawful for any adult entertainment business premises, to be conducted, operated, or otherwise open to the public between the hours of 2:00 a.m. and 10:00 a.m.

Violation/penalty. Any violation of the provisions of this section by the owner, operator or manager of an adult entertainment business is a misdemeanor as set forth in this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.190 Appeal of license denial; hearing.

A. *Notice.* Any person aggrieved by the action of the clerk in refusing to issue or renew any license issued under this chapter shall have the right to appeal such action to the hearing examiner by filing a notice of appeal with the clerk within ten (10) days of notice of the refusal to issue or renew. Such appeal shall be processed pursuant to the hearing procedures set forth in chapter 2.32 of the Kent City Code. The hearing examiner shall set a date for hearing such appeal, to take place within forty-five (45) days of the date of receipt of the notice of appeal unless such time is extended by mutual consent. At such hearing the appellant and other interested persons may appeal and be heard, subject to results and regulations of the hearing examiner.

B. *Final administrative review.* Appeal to the hearing examiner shall constitute final administrative review.

C. *Appeal to superior court.* An appeal of the decision of the hearing examiner must be filed with superior court within thirty (30) calendar days from the date the hearing examiner's decision was personally served upon or was mailed to the person to whom the notice of civil violation was directed, or is thereafter barred.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.200. License suspension and revocation; hearing.

A. *Grounds.* The, clerk, upon the recommendation of the chief of police or other city official responsible for administering laws and regulations pertaining to any

license issue under this chapter, or his/her designee, may suspend or revoke any license issued under the provisions of this chapter at any time where the same was procured by fraud or through a materially false representation of fact; or for the violation of, or failure to comply with, the provisions of this chapter or any other similar local or state law by the licensee or any of his/her servants, agents or employees; or the conviction of the licensee, or any of his or her servants, agents, or employees, of any crime or offense involving prostitution, promoting prostitution, sexual crimes against children, sexual abuse, rape, distribution of obscenity or material harmful to minors, or transactions involving controlled substances (as that term is defined in RCW Chapter 69.50) committed on the premises of the adult entertainment business.

B. *Suspension and revocation.* A license procured by fraud or misrepresentation shall be revoked. Where other violations of this chapter or other applicable ordinances, statutes or regulations are found, the license shall be suspended for a period of thirty (30) days upon the first such violation, ninety (90) days upon the second violation within a twenty-four-month period, and revoked for third and subsequent violations within a twenty-four-month period, not including periods of suspension; except that where the city building official or fire marshall or their designees or the King County Health Department find that any condition exists upon the premises of an adult entertainment business which constitutes a threat of immediate serious injury or damage to persons or property, said official may immediately suspend any license issued under this chapter pending a hearing in

accordance with section 5.10.190 above. The official shall issue notice setting for the basis of that action and the facts that constitute a threat of immediate serious injury or damage to persons or property.

C. *Notice.* The clerk shall provide at least ten (10) days prior written notice to the licensee of the decision to suspend or revoke the license. Such notice shall inform the licensee of the right to appeal the decision to the hearing examiner and shall state the effective date of such revocation or suspension and the grounds for revocation or suspension. Such appeal shall be processed pursuant to the hearing procedures set forth in chapter 2.32 of the Kent City Code. The hearing examiner shall set a date for hearing such appeal, to take place within forty-five (45) days of the date of receipt of the notice of appeal unless such time is extended by mutual consent. At such hearing the appellant and other interested persons may appear and be heard, subject to rules and regulations of the hearing examiner. The decision of the clerk shall be stayed during the pendency of any appeal except as provided in subsection E. below.

D. *Final administrative review.* Appeal to the hearing examiner shall constitute final administrative review.

E. *Appeal to superior court.* An appeal of the decision of the hearing examiner must be filed with the superior court within thirty (30) calendar days from the date the hearing examiner's decision was personally served upon or was mailed to the person to whom the notice of suspension or revocation was directed, or is thereafter barred.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.210. Nuisance declared.

A. *Public nuisance.* Any adult entertainment business operated, conducted, or maintained in violation of this chapter or any law of the City of Kent or the State of Washington shall be, and the same is, declared to be unlawful and a public nuisance. The city attorney may, in addition to or in lieu of any other remedies set forth in this chapter, commence an action to enjoin, remove or abate such nuisance in the manner provided by law and shall take such other steps and apply to such court or courts as may have jurisdiction to grant such relief as will abate or remove such public nuisance, and restrain and enjoin any person from operating, conducting or maintaining an adult entertainment business contrary to the provisions of this chapter.

B. *Moral nuisance.* Any adult entertainment business operated, conducted or maintained contrary to the provisions of RCW Chapter 7.48A, moral nuisance, shall be, and the same is declared to be, unlawful and a public and moral nuisance and the city attorney may, in addition to or in lieu of any other remedies set forth herein, commence an action or actions, to abate, remove and enjoin such public and moral nuisance, or impose a civil penalty, in the manner provided by RCW Chapter 7.48A.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.220. Limitation of liability.

None of the provisions of this chapter are intended to create a cause of action or provide the basis for a claim

against the city, its officials, or employees for the performance or the failure to perform a duty or obligation running to a specific individual or specific individuals. Any duty or obligation created herein is intended to be a general duty or obligation running in favor of the general public.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.230. Violation; penalty; misdemeanor.

In addition to other remedies provided for in this chapter, any person violating any of the provisions of this chapter constituting a misdemeanor shall, upon conviction, be punished by a fine of not more than one thousand dollars ($1,000.00) or by imprisonment for not more than ninety (90) days, or by both such fine and imprisonment, and each and every day during which any violation is committed, continued or permitted shall be deemed a separate offense; provided, no person shall be deemed guilty of any violation of this chapter if acting in an investigative capacity pursuant to the request or order of the police chief or prosecuting attorney or duly appointed agent thereof.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.240. Additional enforcement.

The remedies found in this chapter are not exclusive, and, the city may seek any other legal or equitable relief, including but not limited to enjoining any acts or practices which constitute or will constitute a violation of any

business license ordinance or other regulations herein adopted.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.250. Severability.

If any section, sentence, clause or phrase of this chapter should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this chapter. Any ordinance or regulation in conflict with this chapter is hereby repealed.

(Ord. No. 3214, § 1, 3-7-95)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

FRANK COLACURCIO, *et. al.* Plaintiffs v. THE CITY OF KENT Defendant.	Case No. C95-1176 DECLARATION OF R. BRUCE McLAUGHLIN

I, ROBERT BRUCE McLAUGHLIN, of the City of Indian Rocks Beach, Pinellas County, Florida, DECLARE UNDER THE PENALTY OF PERJURY OF THE LAWS OF STATE OF WASHINGTON

I. BACKGROUND

1. I am in practice as a land use planning Consultant and local government Consultant in the States of Florida, Washington, and elsewhere in the United States.

2. I have a Masters of Science degree in Urban and Regional Planning with a thesis on intergovernmental relationships in the planning process and an undergraduate degree in Political Science with a thesis on American Constitutional Law.

3. I am a member of the American Institute of Certified Planners and of the Canadian Institute of Planners.

4. My credentials as a local government Constitution and land use planner have been accepted by local governments on many occasions in the past.

5. I have been qualified as an expert witness in local government issues and land use planning before the United States District Court for the Middle District of Florida, Jacksonville, Fort Myers, Ocala, Orlando, and Tampa Divisions; the United States Bankruptcy Court for the Middle District of Florida, Tampa Division; the Superior Court of the State of Washington, in and for the Counties of King and Snohomish; and the Hearing Examiner for Snohomish County, Washington; the Circuit Courts for various counties in the State of Florida; the County Courts for Hillsborough and Pinellas Counties; the District Court in and for Stearns County, Minnesota; the Circuit Court in and for Jackson County, Missouri; and the District Court in and for Clark County, Nevada. When I have been qualified as an expert witness, it has often been on the issues of the record supporting various enactments, including the alleged adverse secondary effects of Adult Uses and/or the issue of alternative avenues of communication for Adult Uses and other Adult Use related issues. In addition, I have been qualified as an expert witness with regard to other land use issues such as Comprehensive Planning, Zoning, demographics and the like.

6. I am and have previously been retained as a professional land use planner in Kent, various cities and counties in the States of Florida and Washington, and in the States of Georgia, Hawaii, Michigan, Minnesota, Missouri, Nevada, New York, North Carolina, Ohio, South

Carolina, Tennessee, Texas and Washington, and elsewhere, by various local governments and/or by other private entities who have interests in land or businesses in the respective jurisdictions.

7. I was appointed by the Board of County Commissioners of Hillsborough County, Florida, as a Zoning Hearing Master, to make recommendations with respect to applications for amendments to the Hillsborough County Zoning Code, applications for conditional uses, and Developments of Regional Impact, and to reach Conclusions of Law and to make Findings of Fact and Findings of Consistency or Inconsistency with the Comprehensive Plan with respect to these applications. See Laws of Florida, 1983, C. 83-416.

8. I have been approved by the Florida Department of Administrative Hearings as a non-attorney Petitioner's representative in a Comprehensive Plan consistency challenge.

9. I have been engaged extensively in work involving the review of government actions, and the documentation thereof, including procedures followed for enactment, notices given, referrals made, the substance of the enactment, and the like.

10. In particular, I have previously been retained to research zoning and other ordinances and statutes governing Adult Uses; to conduct an independent analysis, and to testify about those Ordinances with respect to:

a) the nature of the legislation;

b) the methods employed in their enactment;

c) the contents and import of the record;

d) whether or not the legislation has a reasonable predicate, *i.e.* whether the perceived evil which the government allegedly seeks to address is actually engendered by the activity sought to be regulated so that the regulation furthers a substantial governmental interest, and is thus not arbitrary and capricious, either as applied, or facially.

11. I have also frequently been retained to make public records requests of local governments, and to follow-up those requests as necessary.

12. I have been retained by operators of other Adult Uses in Alachua, Brevard, Broward, Citrus, Duval, Hillsborough, Leon, Pasco, Pinellas and St. Johns' Counties, Florida, and in Washington, Georgia, Hawaii, Michigan, Minnesota, Missouri, Nevada, New York, North Carolina, Ohio, South Carolina, Tennessee, and Texas to offer professional planning services related to Licensing and Zoning Regulations and other legislation affecting Adult Uses.

13. I have been retained on behalf of Plaintiffs herein to offer professional local government consulting services with respect to conducting a review of the record of the adoption of Ordinance 3214 as amended by Ordinance 3221, (hereinafter "the Ordinances",) and to review and to express an opinion on, the legislative history of the Ordinances, and the City's purposes in adopting the Ordinances, as indicated by that history.

14. I have personally done or supervised the work described in this Declaration.

15. Accordingly, as set forth herein, I have personal knowledge of the matters hereinafter set forth, and I am competent to make this Declaration, and to offer the opinions herein expressed, and would be competent to testify regarding these expert opinions if called to testify at trial.

16. In this matter, for this Declaration, I have been asked to:

a) review the predicates to the enactment of the Ordinances, and determine whether:

   i) from a factual standpoint, based on the totality of the legislative history record, the Ordinances had as a predominant purpose, the suppression of free speech, and,

   ii) in particular, whether the legislative history of the Ordinances reflects a predominant purpose other than to prohibit and mitigate the alleged adverse effects of exotic dance studios.

   iii) whether there was anything produced in the record before the governing body upon which it could reasonably rely including evidence that such primary and secondary effects were engendered by the types of businesses exemplified by Plaintiffs' proposed exotic dance studio; and whether the legislation at issue could act to ameliorate such effects.

II. MATERIALS REVIEWED

17. I have reviewed the entire set of documents provided by the City, except those documents directly related to the previous litigation, and those related to litigation involving the City of Federal Way. These documents were obtained through requests for production made by Plaintiffs' counsel, and a limited amount of other material was obtained through public records requests made on my behalf pursuant to RCW 42.17, *et.seq.* and through other research endeavors undertaken on my instructions. This latter material, while providing useful background, is not reflected in this my Declaration.

18. Additional material was requested pursuant to RCW 42.17, but with the exception of a small amount of material, the City has refused to honor theses [sic] requests. Much of the material sought pursuant to RCW 42.17 the City failed to provide through discovery, and refused to provide as required by RCW 42.17, *et.seq.* Included in these materials are complete versions of tapes and minutes,[1] of which partial versions have been supplied, and other background materials, all of which are a matter of public record.

19. Because of the overwhelming weight of the evidence in the legislative history already provided, and the almost total lack of contradictory evidence, I do not anticipate that, when and if additional materials are provided, they will change the opinions herein expressed.

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[1] The minutes would have been especially useful in identifying speakers, particularly on the audio tapes.

III. CHRONOLOGY

20. Based on the material I have reviewed, I have prepared a detailed chronology of relevant events, which chronology, which chronology establishes the following key events:

a) *8/11/94* – Settlement Agreement entered between Plaintiffs and City;

b) *8/16/94* – Letter from Ms. Hackett to the Mayor: "I don't want nude dancing in Kent."

c) *9/13/94* – City begins to obtain samples of other Adult Use Zoning and Licensing Ordinances;

d) *9/15/94* – City receives I.R.S. material related to status of entertainers as independent contractors;

e) *9/20/94* – Emergency Zoning Moratorium Adopted, City Council discussion of more restrictive Licensing Ordinance;

f) *9/21/94* – Mayor answers Ms. Hackett's letter: "Members of the City Council and I agree with you wholeheartedly."

g) *10/4/94* – Public Hearing on Moratorium Ordinance;

h) *1/23/95* – First Planning Commission meeting to discuss Zoning Amendment;

i) *2/25/95* – City Council Operations Committee discusses new Licensing Ordinance, also discussion of Zoning Regulations;

j) *2/27/95* – First Planning Commission Public Hearing on Zoning Amendment;

k) *3/7/95* – City Council Public Hearing on, and adoption of, new Licensing Ordinance, also discussion of Zoning Regulations;

l) *3/21/95* – City Council Planning Committee meeting discusses Adult Use Zoning Amendment, Moratorium extended by City Council, and discussion of Licensing Regulations;

m) *3/27/95* – Second Planning Commission hearing on Zoning Amendment;

n) *4/4/95* – City Council Public Hearing on Moratorium extension, Licensing-related findings included;

o) *4/10/95* – City Council Planning Committee meeting on Zoning Amendment, also discussion of Licensing Ordinance;

p) *4/10/95* – Planning Commission Workshop on Zoning Amendment;

q) *4/12/95* – City Council Operations Committee meeting on Amendments to Licensing Ordinance;

r) *4/18/95* – City Council Public Hearing on Licensing Ordinance Amendments;

s) *4/24/95* – Continued Planning Commission Public Hearing on Zoning Amendment;

t) *5/2/95* – City Council discussion of Zoning Amendments;

u) *5/16/95* – City Council Planning Committee meeting on Zoning Amendments;

v) *9/5/95* – City Council Planning Committee meeting on Zoning Amendments;

w) *9/5/95* – City Council sets date for Public Hearing on Moratorium extension;

x) *9/19/95* – City Council Public Hearing on Moratorium extension, also discussion of Licensing Ordinance;

y) *10/3/95* – City Council Planning Committee meeting on Zoning Amendment;

z) 11/7/95 – City Council Planning Committee meeting on Zoning Amendment;

aa) *11/21/95* – City Council Planning Committee meeting on Zoning Amendment, also discussion of licensing Ordinance;

bb) *12/19/95* – City Council meeting on Zoning Amendment, Amendment defeated, also references to Licensing Ordinance;

cc) 1/2/96 – City Council meeting on Zoning Amendment, also discussion of Licensing Ordinance.

21. As noted in the above summary chronology, while many meetings were scheduled to consider either Licensing or Zoning Regulations, many of those meetings ended up including, if not discussions, at least references to the other type of regulation.

22. Key quotations from the above meetings are found in Section IV of this my Declaration, *infra*.

IV. LEGISLATIVE HISTORY EXCERPTS DEMONSTRATING THE PREDOMINANT PURPOSE OF THE ORDINANCES[2]

23. There are numerous direct quotations in the legislative history of the Ordinances, as well as in previous deliberations by the City Council, showing the predominant purpose of the City in passing the Ordinance. I personally listened to audio tapes, and watched and listened to video tapes provided to me by Plaintiff's counsel, which he obtained through discovery. The following excerpts from audio tapes and video tapes are true and correct transcriptions to the extent that the tapes were audible.

24. As set out in Part V. A., *infra*, the City has exhibited a pattern of reacting to proposals to establish exotic dance studios with new and more restrictive regulations. The predominant purpose of such regulations was established in 1988 when there was the following exchange between a Pastor of a church, and the then Mayor, joined later by the City Administrator and another member of City Council, White, (now the Mayor):

> Pastor: "I would certainly urge the council to begin work in drafting the ordinances that are necessary to eliminate the desirability of those

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[2] Except with respect to City Council meeting of 5/3/88, for which an actual transcript was available, quotes and summaries from City Council, Committee and Planning Commission meetings are based on "rough verbatim transcripts" prepared by the Declarant.

people who want to put in those kinds of establishments.

Mayor: . . . "I don't think you're going to have much disagreement from council members. They're going to be looking for whatever type of strategies are effective to address this concern.[3]

" . . . One of the things that we can do is adopt regulations that can address how a business of this type would have to operate. The kinds of regulations that they would have to comply with in order to conduct that business. And those regulations can be quite stringent in terms of the types of organizational structure and that sort of thing that they would have to impose in order to conduct their business."[4]

" . . . that the City Attorney be directed to investigate ways of preventing the location of any exotic dancing establishment in the proposed area, and the matter be referred to the Public Safety Committee."[5]

"I think it's the feeling of the Council and the motion before us that we do everything legally that we can do as a city to block this establishment. . . . "[6]

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[3] Transcript, City Council Public Hearing, 5/3/88, pp. 11 - 12.

[4] *Ibid.*, pp. 24 - 25.

[5] *Ibid.*, pp. 26 - 27.

[6] *Ibid.*, p. 46.

25. The motion was amended to apply to all of the City and carried, thereby continuing the pattern of adopting new Ordinances whenever exotic dance studio are proposed or allegedly become problematic.

26. The predominant purpose of the Ordinances at issue herein was further evident in now Mayor White's anticipatory comments about the Ordinances:

> " . . . research that our legal staff is doing in regards to the business license criteria may well give us that opportunity to discuss this in Court because I think what we will be bringing back to you is something which will be very strict and these businesses may not want to operate in the City of Kent and may well challenge what we may propose, so we may get our day in court."[7]

27. Subsequently, the City received a letter from a Ms. M. D. Hackett, who stated:

"I don't want nude dancing in Kent."

To which Mayor White responded:

> "Members of City Council and I agree with you wholeheartedly."[8]

28. The impetus for the City's adoption of the Ordinances is clearly established in their legislative history:

> "As you know, this is an Ordinance **as a result** of the recent litigation we had in Federal Court regarding an adult entertainment facility going

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[7] Video tape, City Council meeting, 9/24/94 at 1920.

[8] Exhibits A-1 and A-2 to this my Declaration.

up on 214th and 84th – . . . " [Emphasis Added][9]

29. Further proof of the impetus for the Ordinance is found in other comments of the City Attorney:

> City Attorney: " . . . this matter **originated** with recent litigation against the City of Kent regarding the location, the sites available for adult entertainment facilities." [Emphasis Added][10]

30. The impetus for the Ordinances is again emphasized by the City Attorney:

> " . . . it's one that was critical that we get on the books last month because of the potential of a facility coming into town."[11]

31. In addition to the predominant purpose of the members of City Council for the Ordinances at issue herein, as set out in ¶¶ 32 - 37, *infra*, the predominant purpose of the author of the Ordinances is also clearly established in the record:

> "You know, it's . . . like I've said in the Council meeting before, or at other meetings, that you know, that's we can't keep these facilities from

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[9] Audio tape, City Council Operations Committee meeting, 2/25/95 at 7.

[10] Video tape, City Council meeting, 3/7/95 at 1840.

[11] Audio tape, City Council Operations Committee meeting, 4/12/95 at 296.

> coming into Kent, I mean, you know, I've talked about that many times, but this is one thing you can do . . . "[12]

> " . . . You know, we'd all like to ban them including myself, it's, you know, trying to appeal that to the Supreme Court is like jumping off a building without a parachute and – and expecting to come down to a safe landing. It just isn't going to work."[13]

32. The predominant purpose of the Ordinances is further clearly established in the following exchange between a member of the Planning Commission appearing as a citizen at the City Council Public Hearing on 3/21/95, and the Mayor:

> Ms. Nuss: "It is my sincere hope that the stiff regulations that City Council has accepted regarding adult entertainment will cause this businessman to lose interest in developing here."

> The Mayor: "Thank you Ms. Nuss, I think you have articulated the City's position very well. Thank you very much."

Followed by applause from the two City Council members on either side of the Mayor.[14]

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[12] Audio Tape 1, City Council Operations Committee meeting, 2/25/95 at 162.

[13] *Ibid.* at 165.

[14] Video Tape, City Council meeting, 3/21/95 at 503 - 515.

33. Further evidence of the City's official attitude towards Plaintiffs is found in the comments of an unidentified member of the City Council's Planning Committee who stated:

> " . . . We've got one in the neighborhood, whether we like it or not. Hopefully he won't pick up his permit though."[15]

34. The effect of the Ordinances was noted by a member of the Planning Committee: (Janet ?)

> "Thank heavens for the City Council putting the regulations in. I think that's what's stalling him.[16]

35. Later in the same meeting, after one Committee member accuses the City of inviting exotic dance studios into the City, another member responds:

> "I don't believe that we're inviting them in at all. As a matter of fact, by tightening down the regulations [inaudible] I think that our citizens are in great danger here, and I' [sic] sorry that I have never once [inaudible]. I think that by the stiff regulations that the City is proposing that that's going to – to – not – it's going to prove to be just the opposite of an invitation."[17]

36. In the whole legislative history of the Ordinances, there is no clearer indication of their predominant

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[15] Audio tape, City Council Planning Committee meeting, 4/10/95 at 7.

[16] *Ibid*, 4/10/95 at 77.

[17] *Ibid*. at 112.

purpose than the following quotations, first by an unidentified male member of the City Council's Planning Committee:

> "Another point I want to bring up. Everybody's talking about this – this business regulation license practice Ordinance that Roger's written. And it is a beaut. And if it holds up, nobody's going to want to come to this City. And everybody's saying that – they're saying: 'they're not going to want to come here anyway'. So, if they're not going to want to come here anyway, why are we concerned that somebody's going to come here and have our Zoning Code thrown out. They're not even going to try if this is such a great Ordinance."[18]

and the following comments by the Chairman of the Committee:

> " . . . with all the regulations we have adopted and stuff, I'm not too concerned that someone's going to come in and try to open something up. Because we've made it a little bit difficult for them to make money in the traditional way they make money. So we may be in pretty good shape then, but I don't want to take any chances."[19]

37. Finally, during the discussion of the final adoption of the new Adult Use Zoning Regulations, Assistant County Attorney Laurie Evezich stated:

> " . . . in anticipation of the expiration of both the moratorium and the implementation of the Zoning Regulations, the City Attorney's office has

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[18] *Ibid* at 207.

[19] *Ibid.* at 431.

artfully [20] engaged in some licensing regulations and enacted some licensing regulations which we feel protect the citizens of Kent and would reduce any of the negative secondary effects from an adult use businesses . . . "[21].

V. OTHER INDICATORS OF THE PREDOMINANT PURPOSE OF THE ORDINANCES

V. A. HISTORIC PATTERN

38. There is an historic pattern of the City adopting Ordinances as exotic dance studio uses either became problematic, or were proposed in the City, which chronology clearly demonstrates the City's attitude to this land use.

39. In 1981, after the *Roadside Inn Tavern* became problematic, the City, after declaring the business to be a nuisance, and ordering it to be shut, passed Ordinance 2312, prohibiting topless dancing in establishments selling alcoholic beverages.

40. On May 3, 1988, the City Council became aware that an exotic dance studio named *Babes* was proposed for the City. Although the business had "a long row to hoe"[22] before it obtained the necessary permits to open, two weeks later, on May 17, 1988, the City adopted Ordinance 2778, a Licensing and Regulatory Ordinance for

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[20] "Artful" is defined as "crafty, cunning, deceitful, tricky," *Webster's Encyclopedic Unabridged Dictionary of the English Language*, Gramercy Books, New York, NY, 1989, p. 84.

[21] Video tape, City Council meeting, 1/2/96, at 2489.

[22] Verbatim excerpt, City Council meeting, 5/3/88 at 7.

exotic dance studios. A month later, the City also amended its Adult Use Zoning Regulations to include exotic dance studios.

41. As set out in ¶¶ 28 - 30, *supra*, the Ordinances at issue herein were clearly adopted as a result of the Court order permitting Plaintiffs to open their exotic dance studio in the City.

V. B. *POST HOC* JUSTIFICATION

42. Not only does the City show a pattern of adopting more restrictive Ordinances after exotic dance studios are proposed for the City, but the Ordinances at issue herein were clearly adopted with only a *post hoc* factual justification.

43. For example, in the meeting of the City Council's Operations Committee of 2/25/95, the City Attorney, discussing the need for a Public Hearing on Ordinance 3214 stated:

> "This is a protected activity – I – I just want a little bit more, I want an opportunity I would think – I'm recommending an opportunity for -for people to testify on the Ordinance – I think establishing a basis and that our findings coincide with those – with that testimony. I think it would be in our benefit to have a – have an opportunity for testimony even though [inaudible] not want it. I think it would be appropriate to have an actual hearing on it."[23]

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[23] Audio Tape, City Council Operations Committee, 2/25/95 at 50.

44. The *post hoc* nature of the "findings" or justification was echoed by another male speaker at the same meeting, who said:

> "What the hearing will do is allow us – there's a number of findings of fact here – that will give you the opportunity to make those findings."[24]

45. In the course of this same meeting, the City Attorney made further comments, which show the *pro forma* nature of the stated justification for the Ordinances:

> " . . . I'd like to pass this thing quickly, but I think we need to have a hearing and I need to have Mr. Levy have an opportunity to have this document [inaudible] – good faith on this thing and so I want to make sure that he does have a copy of this. . . . I would suggest that we have a hearing at the next meeting, and then if you want to adopt at that point, if you feel comfortable with it.[25]

46. Further, based on my analysis of the relevant documents, it is abundantly clear that the factual and evidentiary material of the "legislative history" is inadequate to show more than mere speculation and conjecture that there are the alleged adverse effects of exotic dance studios, or to show that any of the various Ordinances which the City has adopted will alleviate the perceived harms to a material degree.

47. It should also be noted that each time an Ordinance was considered (and where a work sheet was provided,) the work sheet indicated no unbudgeted impact

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[24] *Ibid* at 151.

[25] *Ibid*, at 136.

and no expenditure was forecast. These findings lead to several possible conclusions:

a) that the City knew that the various Ordinances would fulfill their predominant purpose and keep exotic dance studios from opening in the City, thereby eliminating any potential fiscal impacts and expenditures related to the administration and enforcement of the Ordinances;

b) any exotic dance studio which did open in the City would totally comply with the law, eliminating any need for enforcement expenditures;

c) new Adult Uses in commercial areas would not increase police workloads; *etc.*

48. Based on the foregoing reviews, considerations, requirements and methods, it is abundantly clear that any "evidence" or assertions that the Ordinances might advance a legitimate governmental interest were just "window dressing," and the City of Kent had no real evidence before it of either adverse primary or secondary effects associated with exotic dance studios, thereby clearly indicating that the predominant purpose of the Ordinances was other than to preclude these effects.

V. C. "MOST RESTRICTIVE REGULATIONS"

49. The City of Kent has a long and clear history of attempting to impose the **most restrictive** regulations possible.

50. For example, in the context of the former Adult Use Zoning Regulations, the City has admitted that its

requirement for the segregation of Adult Uses from non-conforming residential uses in commercial areas is unique and the most restrictive of all:

> "The reason for that is that in a review of the legislative history of – which enacted the City of Kent original Adult Use Ordinance and Zoning Ordinances, there was no indication of support for negative secondary effects of Adult Use businesses on these types of uses. And – moreover, the City of Kent is the only jurisdiction that is currently establishing 1,000 foot setbacks from legal non-conforming residential uses or multi-family uses. So, our Ordinance is the most restrictive of all."[26]

51. Further, with respect to the prior Adult Use Zoning Regulations, the Assistant City Attorney stated:

> it was a little bit hard to make the argument [that the Ordinance provided adequate sites with a straight face."[27]

52. A similar pattern is found with respect to the Ordinances at issue herein. There are numerous references in the record to the Ordinances being the "tightest", "most strict", and "most restrictive":

a) The comments of the City Attorney, Roger Lubovich, echoed by the Mayor, that the City wishes to regulate the business as tightly as possible;[28]

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[26] Audio Tape, City Council Planning Committee meeting, 11/21/95, at 176, Assistant City Attorney Laurie Evezich.

[27] Audio tape, City Council Planning Committee meeting, 4/10/95, at 143. ±, Assistant City Attorney Laurie Evezich.

[28] Video tape, the City Council meeting, 9/20/94, at 1554.

b) The comments of Council Member Johnson about the Zoning Regulations, made at the City Council meeting of 1/2/96;[29]

c) The comments of someone named Jim, at the meeting of the City Council Operations Committee, 4/12/95, and the response: " . . . [this is] As tight as we can get it.";[30]

d) The comments made at the Planning Committee workshop, and reported in ¶¶ 33 - 36, *supra;*

e) The comments of the Mayor, set forth in ¶ 26, *supra;*

f) The comments of the Police Chief at the City Council meeting where Ordinance 3214 was adopted;[31]

g) The comments of the City Attorney at the City Council meeting of 4/18/95, describing Kent's 10 foot rule as "a little bit stricter" than Bellevue's four foot rule;[32]

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[29] Video tape, City Council meeting, 1/2/96, at 2560 - 2566.

[30] Audio tape, City Council Operations Committee, 4/12/95, at Side 1, 547.

[31] Video tape, City Council meeting, 3/7/95, at tape 1 at 2245.

[32] Video tape, City Council meeting, 4/18/95, at 1430. In fact, the City of Kent's regulation is 2.5 times more onerous than that of Bellevue with respect to segregating dancers and patrons, and prohibits table dancing which is permitted under the Bellevue Ordinance.

h) The comments of the City Attorney that all dancing occur on stage is a lot stricter than Bellevue's requirement;[33] and

i) the comparison of the Bellevue, Kitsap and earlier Kent Ordinances found in the legislative history.

53. In particular, it is clear that, prior to the adoption of the Ordinances at issue herein, the City of Kent obtained sample Ordinances from a number of jurisdictions, including the City of Bellevue and Kitsap County, and then selected the most restrictive provisions on each topic, as found in the various Ordinances.

54. Based on the foregoing reviews, considerations, requirements and methods, it is abundantly clear that the City of Kent has repeatedly endeavored to make their Adult Use Zoning and Licensing Ordinances as restrictive as possible, thereby clearly indicating that the predominant purpose of the Ordinances was other than to preclude the alleged adverse primary or secondary effects of exotic dance studios.

V. D. THE REACTIONARY NATURE OF THE ORDINANCES AND THE ADEQUACY OF PREEXISTING REMEDIES

55. As set out in ¶¶ 28 - 30, *supra*, it is clear that the Ordinances at issue herein were only adopted after Plaintiffs won a Court order with respect to the zoning for their proposed exotic dance studio.

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[33] Audio Tape, City Council Operations Committee, 4/12/95, Side 1 at 517.

56. Further evidence of the reactive nature of the Ordinances is found in the Chronology in Section III, *supra*.

57. As established by the record provided, and as noted in the *Kent Adult Use Zoning Study*,[34] the City was able to close the *Roadside Inn Tavern*, (for the same alleged problems, as allegedly cause the concerns with Plaintiffs' proposed use,) based on City Ordinances and state law, as they existed in 1981, prior even to the 1988 Ordinance passed in response to the proposed opening of the *Babe's* exotic dance studio in the City.

58. Thus, to the extent that the City was genuinely concerned with preventing the alleged adverse primary (controlled substances, and illicit sexual contacts,) and secondary (increased demand for police services, relative decreases in property values, and urban blight,) effects, as early as 1981, the City had an adequate remedy in its then existing Ordinances and state law.

59. Based on the foregoing determinations, that the Ordinances were adopted in reaction to the Order of this Court, notwithstanding the adequacy of the preexisting remedies, it is abundantly clear that the City of Kent had an adequate preexisting remedy for its alleged concerns with Plaintiffs' proposed business, thereby clearly indicating that the predominant purpose of the Ordinances was other than to preclude the alleged adverse primary and secondary effects of exotic dance studios.

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[34] City of Kent Planning Department, *op.cit.*, at 10.

VI. CONCLUSION

60. For the reasons set out in the preceding subsections of this my Declaration, and in Section III of this my Declaration, it is abundantly clear that the predominant purpose of the City of Kent in enacting the Ordinances at issue herein, was to stop Plaintiffs business opening in the City.

61. Further particular proof of this predominant purpose is found in the comments of Council member Orr, quoted in ¶ 36, *supra*, and

a) in the *pro forma* attempt to provide Plaintiffs' counsel with an opportunity to appear at a Public Hearing, when the substance of the Ordinance was already completely decided;[35]

b) in the fact that the "findings" of the Ordinance were made prior to the hearing at which the City expected to receive testimony to substantiate those findings;[36]

c) in the knowledge of the City Attorney that the Ordinances would have an economic impact on Plaintiffs' proposed business;[37]

d) in the knowledge of the City Attorney that the entertainers are independent contractors who make their money selling table dances;[38] and especially

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[35] Audio tape, City Council Operations Committee, meeting 2/25/95 at 136.

[36] *Ibid.* at 151.

[37] Lubovich deposition at 17-18,

[38] *Ibid.*, p. 19.

e) in the comments by a member of the City Council's Operations Committee (Janet?): "Thank heavens for the City Council putting the regulations in. I think that's what's stalling him."[39]

f) in the colloquy between Ms. Nuss and the Mayor, set forth in ¶ 32, *supra;* and

g) in the exchange of correspondence between Ms. Hackett and the Mayor, ¶ 27, *supra* and Exhibit A.

62. Further still, at the time the City Council adopted the first Moratorium Ordinance, the Mayor stated:

> "Being asked to pass Ordinance declaring moratorium – asked legal department, Mr. Lubovich to look at other ways Adult Uses may be regulated – certainly not opening arms to welcome this type of business into community. We don't want it, we feel like we're being forced to take it."[40]

63. Based on the foregoing items, numerous other statements, inferences clearly drawn from the record, and the totality of the factual record in this matter, it is abundantly clear that the City of Kent's predominant purpose in the adoption of the Ordinances, was other than a legitimate purpose.

/s/ _____
R. Bruce McLaughlin

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[39] Audio Tape, City Council Planning Committee, meeting 4/10/95 at 77.

[40] Video tape, City Council meeting, 9/20/94 at 1554.

EXHIBIT A-1

RECEIVED
AUG 19 1994
OFFICE OF THE MAYOR

Molly Durfee Hackett
22211 124th Avenue SE
Kent, Washington 98031

August 16, 1994

Dear Mayor

I am writing to let you know that I don't want nude dancing in Kent. If the zoning is modified to allow it, I would wish that it be done very carefully and thoughtfully.

The family-friendly aspects are one of the best aspects of Kent and something we can all take pride in.

I am not a nimby or a prude – just a concerned parent and citizen. Regards – Molly Hackett

P.S. Please let me know if I can be of further help.

EXHIBIT A-2

CITY OF KENT

(LOGO)

Jim White, Mayor

September 21, 1994

Molly Durfee Hackett
22211-124th Avenue S.E.
Kent, WA 98031

Dear Ms. Hackett,

Thank you for your recent letter in which you shared your concern about the City of Kent allowing clubs that feature nude dancing. Members of the City Council and I agree with you wholeheartedly. While we want to be in compliance with the law, we also want to protect the rights of our citizens and we are making every effort to see that Kent remains a good place to live.

As a matter of fact, at our Council meeting last night, the Council voted to adopt a six-month emergency moratorium on new applications for adult entertainment establishments. While the moratorium will not apply to the already proposed club, it will, in effect, insure that no business licenses will be granted to that type of business for six months which will give us some time to explore other options. I am including an article from today's Valley Daily News which gives more details about the situation.

I am sending copies of your letter to members of the Kent City Council and to Roger Lubovich, Kent City Attorney, so that they will be aware of your concerns.

Again, I appreciate your taking the time to write.

Sincerely,

/s/ Jim White
Jim White
Mayor

JW:jb

APPENDIX F

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK COLACURCIO, JR., DAVID EBERT, and STEVE FUESTON dba DDF&S INVESTMENT COMPANY Plaintiffs, vs. THE CITY OF KENT, Defendant.	)	No. C95-1176Z **DECLARATION OF JUDITH LYNNE HANNA**

JUDITH LYNNE HANNA, under penalty of perjury under the laws of the State of Washington, declares as follows:

1. I am a cultural anthropologist, Senior Research Scholar at the University of Maryland, educator and writer.

2. I earned a bachelors degree in political science from the University of California at Los Angeles in 1958, a masters degree in political science from Michigan State University in 1962, a masters degree in anthropology from Columbia University in 1975 and a doctoral decree [sic] from Columbia University in 1976. My doctoral dissertation was on dance as nonverbal communication.

3. I have training in dance and have been a dancer since 1946. In addition, I taught dance and about dance at Michigan State University in 1965, the University of Texas, at Dallas in 1976, and Fordham University during 1970-1973. I have been a consultant in dance education for New York University; African-American Institute; Peace Corps; New York City Board of Education; School District of Philadelphia; Black Studies Department, City College, City University of New York; Gill/St. Bernard's High School, Bernardsville, New Jersey; West Dallas Community Center; Disney World; National Geographic Society; and Montgomery Public Schools. Recognition for my research on dance includes National Endowment for the Humanities, National Institutes of Health, and the Uniformed Services University of Health Sciences funded public lectures; American Council for Learned Societies, Wenner-Gren, National Science Foundation, American Sociological Association, American Psychological Association, International Research and Exchanges Board research grants; invited keynote addresses; and the W.G. Anderson award for significant publications. I have been an invited speaker on dance at the annual meetings and special symposia of various academic disciplines in the United States, Canada, Europe, and the Caribbean.

4. Anthropology comprises four (4) separate disciplines: physical anthropology, cultural anthropology, linguistic anthropology, and archeology [sic]. Anthropologists most often specialize in one area but have training in all four. I have specialized in cultural anthropology focusing on the arts and developing expertise in the study of dance and nonverbal communication.

5. I have conducted field work in the United States and Africa studying and performing arts and society, communication in education, and urban politics. Field research has taken me to Ubakala Igbo villages in Nigeria, fields, streets, and theaters in Uganda, Kenya and the United States, a desegregated magnet elementary school – and most recently to adult entertainment cabarets. In my field work, I examined how dance movement, in the context of time, space, and effort, like language (which it is), is able to convey messages. I have also studied what messages performers were trying to send, how they did it and what the audience perceived in that communication. In one study, I asked performers what feelings, emotions and ideas they were trying to convey and how they thought these were communicated. I also surveyed the audience to determine what they saw and what the significant cues were to receiving the messages. The coincidence of performers' communication intentions and audience member perceptions was a measure of successful communication.

6. Over the years, my writings have been frequently published. I have written four substantial books on dance and about eighty (80) articles on dance in peer-reviewed scholarly journals. My books include: *To Dance Is Human: A Theory of Nonverbal Communication*, University of Chicago Press; *Dance, Sex and Gender: Signs of Identity, Dominance, Defiance, and Desire*, University of Chicago Press; *Dance and Stress: Resistance, Reduction and Euphoria*, AMS Press; and *The Performer-Audience Connection: Emotion To Metaphor in Dance and Society*, University of Texas Press. I have two additional books on dance under contract for publication.

7. On two occasions I have been permitted to testify as an expert in court on issues relating to topless dancing, i.e., King County, Washington, and Las Vegas, Nevada.

8. Prior to and subsequent to my testimony I conducted field work in cabarets involved in challenges to new legislation. I have continued this work in order to gain an understanding of the industry and the related community conflicts about them. My research has taken me thus far to 15 adult cabarets: six (Club Extasy, Deja Vu Airport, Deja Vu-Lake City, Sugars, Papagayos, and Babes) in the greater Seattle metropolitan area; Filmore and For Your Eyes Only in Toronto; Good Guys, 1720, and Camelot in Washington, D.C.; Admiral in Chicago; Club Paradise and Little Darlings in Las Vegas; and Platinum in New York where I interviewed dancers, customers, owners, managers and staff. By telephone I have interviewed these types of informants in other states and in Canada.

In addition, I read master's and doctoral theses, books, and articles on striptease dancing in Atlanta, Boston, Eugene, Las Vegas, London, Montreal, New Orleans, New York, Providence, rural New England and the South, Quebec (Ontario), San Diego, Toronto, and Walnut Creek (California). These works were written by scholars, journalists, photographers, and former strippers. The latter works are confessionals, catharsis, confrontations with society's perception of exotic dancing as deviant, and social hypocrisy. I also have been reading publications by WHISPER (Women Hurt in Systems of Prostitution Engaged in Revolt); *AVN* (Adult Video News), *Stripper Magazine*, *Showgirls*, and EDA (Exotic Dancers Alliance).

9. I worked with Edward I. Donnerstein, Ph.D., Professor of Communication and Psychology at the University of California, Santa Barbara, and Chairperson of the Department of Communication, on a two-pronged study of erotic dance. Dr. Donnerstein is a specialist concerning the study of sexual and/or erotic expression and the effects of such on human behavior; he has served as a member of the United States Surgeon General's Workshop on Pornography, chaired by Surgeon General C. Everett Koop, and he was the lead social science witness to the United States Attorney General's Commission on Pornography chaired by Attorney General Edwin Meese. The study asked what difference it made if the dancer were closer or further from a customer, and clothed or nude, in sending and receiving messages. My role was to provide background material on dance as communication and to help develop the interview schedules for the customers. The aim was to determine if a nudity component of erotic dance and a proximity component of erotic dance were each part of the message content being communicated through such dance, as opposed to being merely the manner in which the dance was displayed. That is, what impact, if any, would there be by precluding nudity in such dance performances, and what impact, if any, would there be by precluding the customary industry-wide 1-6 inches distance between performers and customers.

The study, partially submitted to the United States District Court for the Middle District of Tennessee, Nashville, Division, 1995, in the State of Tennessee Public

Indecency Statute Litigation, found that nudity and proximity were each, indeed, expressive components of the dance.

10. Attached hereto as exhibit "A" is a copy of my curriculum vitae.

11. I was hired by Gilbert H. Levy to provide certain opinions relating to the impact of Pierce County Ordinance 94-5 on the attempted message and speech of erotic dancers in Pierce County, Washington, and also to provide an opinion on whether or not table dances, as opposed to stage dances, as they are commonly performed in the State of Washington and in other areas of the United States and Canada are a unique form of dance expression, which are adversely impacted by the Pierce County Ordinance. It is my understanding that the Pierce County Ordinance requires that all erotic dancing take place on a stage ten feet from the nearest patron.

12. Like verbal speech, dance has communicative components. Verbal speech uses the mouth, vocal cords, and body language to communicate. Dance uses the body language of movement through time, space and effort as the raw material for the performance of kinetic messages; music, costume and verbal speech may enhance the messages. Dance requires the same underlying faculty in the brain for conceptualization, creativity and memory as does verbal language in speaking and writing. Both forms have vocabulary (steps and gestures in dance), syntax or grammar (rules for putting the vocabulary together) and semantics (meaning). Dance, however, assembles these elements in a manner that more often resembles poetry,

with its multiple, symbolic and elusive meanings. Pragmatics (the social, economic, cultural and historical context in which a communication takes place) applies to verbal and nonverbal forms. As with much linguistic behavior in which an individual creates sentences and responds to them without being conscious of how it is done, dance processes sometimes operate without the dancer's or spectator's awareness of the vocabulary, grammar and semantics of a dance idiom. Dancers and spectators construe meaning from their personal and cultural experiences. Consequently, they have different expectations for different forms of dance. Different forms of dance have different aesthetics, or notions of appropriateness and competency. Dancers and spectators often engage in nonverbal "communication" as the spectator responds to the dance communication.

13. Dance communicates through the senses: There is the sight of dancers moving in time and space. There are the sounds of physical movements on the floor and body as well as breathing. There is the smell of the dancer's breath, physical exertion, and perfume. There is the tactile sense of body parts touching the ground, other body parts, people or props. There is what is called the proxemic sense, that of distance between people. And there is the kinesthetic sense (feeling of bodily movement and tension, or empathy with dancers). Each of these sensory components contributes to conveying the message of the dance.

14. In erotic dancing (also called exotic or striptease dance, and including the specific forms of table, couch or lap dancing), the performer uses movement of the body, often simulating culturally-specific rhythms of sexual

activity, to suggest, e.g., sexual flirting, foreplay, and consummation. A female performer attempts to entice the audience member(s) through the display of feminine sensuality – and to stimulate an economic transaction with an audience member in exchange. Male performers similarly attempt to entice patrons. The performer-audience connection depends on the dancer receiving feedback to validate the desirability, passion and adoration she or he must project.

15. In the United States and Canada, table dances are a distinct form of erotic dance performed by performers in variable states of clothing (and sometimes complete nudity) in front of an individual audience member at his or her table at a distance ranging from 1 to 6 inches. Similar to table dances are stage dances where the dancer performs within 6 feet to 1 inch from the patron. The patron of dancing may become part of the performance for other audience members who can identify with the patron. Unpredictable spontaneous exchanges between the performer and the patron create entertainment value for everyone.

16. The table dancer focuses on an individual audience member and the particular customer's responses in order to send *a personal message not manifestly intended for the audience as a whole.* The message of "I am for you and you alone," "you're special," and "you're important" permits the individual customer "rapture," as one dancer explained, a fantasy of assignation, possession, foreplay, and consummated relationship. The message of the dance is personal interest in and understanding of the customer, eroticism, desire, allure, promise of ecstasy, and the beauty of the body. The entertainer creates an illusion of

concern and availability for the customer, and seeks to effect a transformation in the patron's feelings. Some customers get the personal attention of an attractive female who would not otherwise relate to them or "give them the time of day"; some customers are reminded of what it is to be desired.

Nobel Laureate Octavio Paz explains that eroticism as a "representation" diverts or denies sex in action. Eroticism is "sexuality transfigured, a metaphor. The agent that provokes both the erotic act and the poetic act is imagination . . . eroticism is a metaphor . . . Like all metaphors, it points to something that is beyond the reality that gave rise to it, something new and different from the terms that it comprises." Paz says, "Eroticism is, above all else, exclusively human: it is sexuality socialized and transfigured by the imagination and the will of human beings."

17. An essential element of dance that allows a table dancer to send a personal message of intimacy and spontaneity not found in a stage dance is *the use of space – proximity.* The kind and meaning of distance between people in sending and receiving messages has been studied by Edward Hall. He told us as early as 1966 in his book, *The Hidden Dimension,* that groups differ in the amount of spatial distance between communicants. For example, among the Arabs, olfaction occupies a prominent place. "Arabs consistently breathe on people when they talk . . . To smell one's friend is not only nice but desirable, for to deny him your breathe is to act ashamed" (p. 159-160). Norine Dresser's 1996 book, Multicultural Manners: New Rules of Etiquette for a Changing Society, notes that when a Filipino mother is going

out she leaves on a child's pillow or in the baby's crib a piece of clothing that she had just removed so that her scent remains with the child, offering reassurance she is still with her offspring. A grandmother will sniff a child, because odors, inter alia, disclose information about health and hygiene. In addition to cultural diversity, audience members vary in their physical ability to see, hear, and smell. In the aesthetic of table dance, audience members receive erotic messages through their senses, especially the visual and olfactory. They see muscle contraction and release, nipple erection, and tension and relaxation, as the body gyrates, pulsates, trembles, wiggles and writhes, and shimmies in time and space with effort. They smell the dancer's odor, especially perfume. Constance Classes in her study *World of Sense: Exploring the Senses in History and Across Cultures* explains the importance of olfaction. Scent has a long-standing association with sensuality, a spicy smell conveys the social identity or alluring femmes fatales. Anthropologist Helen Fisher, in *Anatomy of Love* says, "The human body may produce some of the most powerful olfactory aphrodisiacs of all. Both men and women have 'Apocrine' glands in their armpits, around their nipples, and in the groin that become active at puberty." Fragrance sells homes, makes people feel good, and is associated with intimacy. Even the Bible attaches value to fragrance; the Song of Songs is particularly noteworthy for its olfactory imagery that bespeaks of romance.

In American culture, Hall found that intimate distance has a close phase: 0-6 inches, such as in lovemaking, wrestling, comforting, and protecting. The far phase is 6-18 inches for less intense but still intimate

interaction. Personal distance, the usual space we maintain between ourselves and others has a close phase: 1½ to 2½ feet for people bonded in some ways, such as family members. The far phase is 2½ to 4 feet used for discussing subjects of personal interest and involvement. Social distance has a close phase of 4-7 feet used for impersonal business. The far phase of 7-12 feet is for formal business as in an office or home. Public distance has a close phase of 12-25 feet, such as in a presentation to a small audience. The far phase is 25 feet or more. We have spatial separation appropriate to certain types of interaction. A romantic/sexual relationship in American culture commonly includes a dinner or nightclub date with the pair seated proximate: 0 to 36 inches apart. Close physical distance is itself a sign of attraction and often bespeaks of eros. Little spatial distance between a dancer and customer is a metaphor of tactility, part of sexuality. Ashley Montagu in *Touching: The Human Significance of the Skin,* has pointed out that there is a massive involve of skin in sexual congress. Consequently, in the erotic dance industry, the norm for table dance is proximity (1 to 6 inches) because this permits a greater multisensory interaction between the individual audience member and the performer than occurs in a stage dance where the customer may be 6 feet or more from the dancer. Propinquity permits the collection of information that enhances communication. The dancer, an actress, and customer must be able to "read" each other: proximity permits eye contact and awareness of indicators of attraction and satisfaction such as the mouth position, eye brightness, pupil dilation and expansion, facial color, breath, perfume, and body odors.

Proximity in other kinds of dance is used to involve the audience member in the performance and to create a mood or sense of immediacy, a sense of "here and now." For example, the performance of "Astarte" by Joffrey Ballet started with a dancer actually seated in the audience, next to paying patrons. Some performances involve inviting audience members on to the stage, while others involve the performers coming off stage into the audience area. Dance audience members, myself included, often sit a foot away from the dancers at the Dance Place in Washington, D.C. Dancers dance in close proximity in flamenco in the caves of Granada, at weddings among Arabs and Jews, and in numerous African cultures. Indeed, some religious services create a sense of closeness and immediacy by taking the gospel into the pews where the congregation sits.

I base the opinion of the essential importance of close proximity in table dancing on my education, training, background, knowledge of the literature, field work in general, field work in the area of topless dance, and interviews with dancers and customers.

18. Stage dances, as the name implies, are dances performed on stage for the audience as a whole. The dances serve to showcase the performer and advertise her or him for individual table dances. If the dancer were only performing on stage with a 10 foot distance between dancer and customer, this would, by contrast with table dance, denote coldness and impersonality. On-stage the dancer is viewed on a pedestal and inaccessible. "Bugaku," an erotic ballet performed by the New York City Ballet in a 3,000 seat opera house at distances of several hundred feet provides an illustrative contrast with table

dance: "Bugaku" is an interaction about two people on stage, whereas table dance is an interaction between a dancer and a customer off stage.

19. Disappointment in the erotic dance because of its inability to convey the expected erotic message of table dance will result in a degradation of the dancer's message such that it completely eliminates the table dance, a distinct form of dance and medium of expression.

20. It is my professional opinion that restrictions on dance that prohibit proximity will have a negative impact on the arts as a whole. Different dance genres influence each other and patrons of one dance form often explore other dance forms. Response of my informants regarding notions of intimacy, privacy, and the illusion of a relationship suggest that patrons' expectations will not be satisfied and the audience will be disappointed. Disappointment in the dance because of its inability to convey the expected personal erotic message will result in fewer dances being performed.

21. It is my professional opinion that in the context of erotic dance, proximity is an expressive component of the table dance and is not merely incidental conduct associated therewith.

22. It is my professional opinion that in the context of erotic dance, proximity is, itself, an expressive component of the table dance and is not merely the manner in which such dance is performed.

23. I have been asked to render an opinion as to whether the requirement that dancers perform 10 feet

from the customer simply makes the message as expressed in the dance performance slightly less graphic, as opposed to altering the actual message and content of the expression. It is my professional opinion that requiring dancers to maintain such distance directly and unmistakably effects the content of the erotic message sought to be conveyed by the performer.

I HEREBY DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 2 day of July, 1996, at Seattle, Washington.

/s/ Judith Lynne Hanna
JUDITH LYNNE HANNA

APPENDIX G

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK COLACURCIO, JR., DAVID EBERT, and STEVE FUESTON d/b/a DDF&S INVESTMENT COMPANY, Plaintiffs, vs. THE CITY OF KENT, Defendant.	NO. C95-1176Z **DECLARATION OF EDWARD I. DONNERSTEIN**

Dr. Edward I. Donnerstein, under penalty of perjury under the laws of the State of Washington, declares as follows:

1. I am a Professor of Communication and Psychology at the University of California, Santa Barbara, and am currently Chairperson of the Department of Communication. I was Chairperson of that Department from 1986 to 1991, Vice Chairperson from 1991 until 1994, and once again returned as Chairperson this year.

2. I teach in the areas of the psychological effects of media, mass media policy, policy implications of social science research, and research design, methods and statistics. I have taught these subjects, and particularly the area

of research design, since 1972, and my teaching experience has been in Illinois, Iowa, Wisconsin, Canada, Beijing, China, and in California.

3. Although my research and teaching is devoted to a wide variety of areas, I have developed over the years the areas of specialization concerning the study of sexual and/or erotic expression, and the effects of such on human behavior, and the effects of violent forms of communication on individuals. My areas of concentration often concern the intersection between psychological theory and research, and the law.

4. My expertise in the area of sexual and/or erotic expression has resulted in me serving as a member on the United States Surgeon General's Workshop on Pornography, chaired by then Surgeon General C. Everett Koop during the Reagan administration, and as the lead social science witness to the United States Attorney General's Commission on Pornography chaired by Attorney General Edwin Meese, also during the Reagan administration, which has generally been referred to as the "Meese Commission."

5. I regularly obtain grants for the conducting of studies that I have designed, and many of these grants have been provided through various governmental agencies and organizations, including the United States Army, the National Institute of Health, the National Institute of Mental Health, and the National Science Foundation. In 1994, I, along with a number of my colleagues, was awarded a grant in excess of Three Million Dollars by the National Cable Television Association to conduct research

from 1994 until 1998 with regard to the content of depictions of violence on television; this grant being part of a governmental and industry desire to assess the levels of violence on television so as to inform legislators, parents and the industry as to solutions regarding media violence.

6. As indicated in my current Curriculum Vitae (hereinafter "C.V."), a copy of which is attached hereto and incorporated herein by reference, I have published regularly and frequently over 125 articles in my areas of specialization. In addition, I have testified frequently as an expert witness in court and before legislative bodies, both domestic and foreign, regarding human sexuality, pornography, violence, the media, and the effects of erotic expression on human perceptions and behavior. This testimony is set forth, in detail, on pages 27-28 on my C.V., and includes testimony before the Canadian Commission on Pornography and Prostitution, various committees of the Parliament of Australia, the New Zealand Indecent Publications Tribunal, the United States Senate Judiciary Committee, and the Federal Communications Commission. I have been qualified as an expert witness in the areas of erotic expression and its effect on human perceptions and behavior in numerous courts in the United States and Canada, including, but not limited to testimony in the United States District Court for the Western District of Tennessee, in the case of *United States of America v. Ellwest Stereo Theatres of Memphis, Inc., et al.*, Case Nos. 89-20254-G, 89-20255-G, and 89-20256-G, before the Honorable Julia S. Gibbons. Most recently, I testified before the United States Senate Commerce, Science and Transportation Committee on July 12, 1995 and

presented testimony on the effects of mass media violence. This testimony was offered in connection with the research grant and study we are conducting concerning television violence and development of the so-called "v-chip".

7. I regularly, and on an ongoing basis, design and conduct research studies regarding the effects of mass media, the effects of certain forms of expression upon individuals and groups of people, and matters concerning the interrelationship between the mass media and social policy.

8. In June, 1995, I was contacted by Jack R. Burns and asked to design and to conduct a study concerning the expressive message being conveyed in erotic performance dance, in order to determine what impact, if any, there was on this message by a requirement that there be a certain distance between the performer and her audience during such performances. In particular, we were asked to test the accuracy of the statement in *Kev Inc. v. Kitsap County*, 793 F.2d 1053, 1061 (9th Cir. 1986) that "[w]hile the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired.. Basically, we were asked to design and carry out a study to determine if a distance component of certain erotic performance dance was part of the content of the message being communicated by and through such dance, as opposed to being merely the manner in which such dance was displayed, and, if so, what impact, if any, on such a message there would be by increasing the required distance between performer and audience.

9. With these goals in mind, my associate, Dan Linz, and I visited an erotic dance establishment, Little Darlings, in Las Vegas, Nevada, in order to familiarize ourselves with the type of dancing involved, the manner in which it was normally performed, and to develop a conceptual format for conducting a study. Little Darlings is run by the "Deja Vu" organization, and, from what I have been told, provides the same type of performance dance entertainment as exists in other "Deja Vu" clubs around the country, including that in Pierce County, Washington. As a result of this visit, consultations with Beth LePoire, a professor in our department who specializes in non-verbal communication, and consultations with Judith Lynne Hanna, a cultural anthropologist who specializes in the communicative aspect and content of performance dance, we designed a study that objectively measures the impact of nudity or non-nudity on the ability of an erotic entertainer to effectively convey the message of her dance.

10. In designing this experiment, we actually chose to conduct two (2) separate studies. This was done for two reasons. First, one of the studies was part of a larger study involving performance dance. Second, two different types of studies were chosen so that we would have greater confidence in our results if, in fact, any differences were measured between the four (4) foot and six (6) inch conditions as a result of the responses received from the participants. The study, described in the report attached hereto was designed, with regard to the variable of distance, as a "between-subjects" design. This means that participants did not see both a performance in the nude, and a performance clothed. They simply saw the same dance performance (whether it be, randomly, nude

or non-nude) at varying distances (the nude variable being related to the other portion of this study that is not relevant here). As a consequence, the participants of this study were not afforded the opportunity to compare the same dance performance in a condition of nudity and a condition where the performer was clothed. Because of this lack of comparison, it is much more difficult to obtain results where responses are different on the basis of the variable chosen (here, distance). Thus, when differences are observed in a between-subjects study design, this indicates that the chosen variable (here, again, distance) has an extremely strong effect on the perceptions and attitudes of the participants, and that we can be extremely confident that the measured differences are, in fact, as a result of the study variable (i.e., distance).

11. Attached hereto is the Final Report of the Distance and Message Effectiveness Study that we conducted, and I incorporate by reference the text of that report herein. The final report was prepared by myself, and my associate, Dr. Daniel Linz, and the statements and findings as contained therein are true and accurate. Below is a brief description of our study design and methodology:

a. Study Subjects. We determined that it was appropriate to use regular patrons of an erotic dance facility inasmuch as our goal was to measure the consequences of various controls to dance entertainment upon the intended audience of such entertainment. With a random selection of subjects, there would undoubtedly be some who found any sort of nude or erotic dance objectionable. As a consequence, their responses would reflect their

distaste for the dance itself, rather than the discrete variables we were attempting to measure. By selecting club patrons, our study would not suffer from this problem.

b. The Dance. In viewing the establishment offered at Little Darlings, it was immediately apparent that each entertainer had her own style. In order to control for variations in style which might affect the communicative aspects of the dance, i.e., one style may be more communicative than others, it was determined that it would be necessary to choreograph a single dance so that each subject was presented with essentially the same dance, with the only variables being those that we were seeking to measure. A professional choreographer was retained to choreograph a specific dance routine and to teach it to the entertainers that we were going to use in the study. Prior to the commencement of the study, I confirmed that all of the dancers knew the choreographed dance routine and could consistently perform it. I have reviewed the dance routine that was choreographed and that was used throughout these studies, and it is entirely comprised of various dance performance components that are regularly used, seen, and displayed in the Little Darlings club.

c. The Entertainers. To the extent possible, we attempted to recruit entertainers that possessed generally the same physical characteristics. In addition, the entertainers wore identical costumes, undergarments and perfume. Out [sic] goal was to reduce "attractiveness" as a variable.

d. Study Format. With the cooperation of Little Darlings, we isolated an area of the club with curtains. This area was divided into four areas; an area for each of three

subjects, and a waiting area for the entertainers and for our observer. When seated, a subject could not view any other subject, the entertainer performing for another subject, or the entertainer waiting area.

Nine separate entertainers were used in the study. Three (3) entertainers appeared randomly for each set of subjects. Each entertainer performed the same dance, once for each of the three (3) subjects.[1] Each subject received three (3) dances; i.e., a dance at a distance of four (4) feet, a dance at approximately six (6) inches, and a dance at six (6) inches with a single brief touch on the cheek, shoulders and forearm.[2] Half of the time, the dances were performed in a nude condition. In this condition, the dance started with the entertainers clothed in a dress only. During the dance, the dress was removed so the entertainer was entirely nude. The other half of the time, the dances were performed in a non-nude condition. In this condition, the entertainers wore a bra and panties under the dress which were not removed when the dress was removed. In this study, each participant would see the three performers either all nude or all non-nude.

---

[1] On occasion, only two subjects would be available. On those occasions, each subject still received three (3) dances, one from each of the three entertainers dancing in that round.

[2] As discussed above, because of the additional variable of touch, no data concerning study participants who were subjected to the "6-inch touch" performance is included in the report attached hereto, and my opinions as contained within this Affidavit are not based upon any such data.

Prior to the dances, the subjects were instructed not to talk to the entertainers. This was done in order to control for the effect of verbal communication. While the dances were being performed, we stationed an observer, Eva Blumenthal, a graduate student in our communications department, in the room where she could observe each dance. Her job was to verify that each dance was performed as choreographed and that the study rules regarding verbal communication were observed.

After the dances were completed, each subject was asked to complete a questionnaire designed to measure several attributes of the dance communication.

e. The Questions. The questions that were contained in our studies, relating to perceptions involving the dance performances, were derived from a number of different sources. First, we were provided with copies of the United States Supreme Court decision in *Barnes v. Glen Theatre. Inc.*, 501 U.S. ___, 115 L.Ed.2d 504 (1991), and the underlying Circuit Court of Appeals decision in *Miller v. Civil City of South Bend*, 904 F.2d 1061 (7th Cir. 1990). These cases discuss, and, in particular, the concurring opinions in *Miller*, the "message," ideas, and concepts that are attempted to be conveyed, and are conveyed in and by erotic performance dance. Second, as referenced above, an associate of mine, Dr. Beth Lepoire, a professor in our department who specializes in non-verbal communication drafted a number of the questions, particularly with regard to the relational communication questions, as used in the study. Third, we received the input and advice of Dr. Judith Lynne Hanna, a cultural anthropologist, who has significant professional research experience, both in dance and erotic performance dance, and who

also provided to us various written materials on these subjects. After receiving the input of these professors, and my associate, Dr. Daniel Linz, we, in consultation with one another, came to a consensus opinion as to the questions to ultimately be used in these studies. In my professional opinion, from the legal decisions that I have been provided, from the research that I have conducted, from my review of the topical literature, from my previous professional experience and training, and from the input that I have received from my colleagues, the questions as contained in the two studies, and as are reported on in the final report attached hereto, are all appropriate questions which measure the communicational aspects and attributes of erotic performance dance.

12. We began gathering data on Monday, August 21, 1995 and finished on August 24, 1995. The results of the study are contained in the Final Report of the Distance and Message Effectiveness Study attached hereto and incorporated herein by reference. The results found in the final report are statistically significant, and contain the appropriate level and degree of confidence to enable me to reach certain conclusions as a result of these studies.

13. The findings as set forth in the final report are reported in terms of probability factors (i.e., "P < .05"). This is the confidence level that we would ascribe to the reported results. Thus, if the report shows a probability factor of .05 ("P < .05"), that means that we are 95% sure that the results that have been obtained are as a direct consequence of the variable as set forth in the study (i.e., distance), as opposed to some random chance. The probability factors that we have utilized in these studies in

order to determine statistical significance are the generally accepted levels in the scientific community.

14. In analyzing the data obtained, the appropriate scientific method would be to sum the responses to the various questions as are contained within the three categories of measurement (relational communication, erotic communication, and social communication?, in order to come up with three separate composite scores. This is the appropriate scientific methodology to determine the statistical significance of the results obtained from these studies, and we have reported the data as such. We have also provided the statistically significant results obtained on separate individual questions as a result of a request of the attorneys involved in this matter.

15. The primary findings of the study are that:

a. The relational communication as expressed in erotic performance dance is significantly and substantially reduced and degraded by separating the entertainer as little as four (4) feet from her intended audience.

b. The erotic communication as expressed in erotic performance dance is significantly and substantially reduced and degraded by separating the entertainer as little as four (4) feet from her intended audience.

16. Based upon these findings and the results of the final report, I have reached the following conclusions which I hold in my professional opinion to a reasonable degree of scientific certainty;

a. In the context of erotic performance dance, distance is, itself, an expressive component of the dance and not merely incidental conduct associated therewith.

b. In the context of erotic performance dance, distance is, itself, an expressive component of the dance and not merely the manner in which such dance is performed.

c. The requirement that dance performers be separated from their intended audience by a minimum distance of ten (10) feet significantly and substantially deprives the dance of the relational message that is sought to be conveyed.

d. The requirement that dance performers be separated from their intended audience by a minimum distance of ten (10) feet significantly and substantially deprives the dance of the erotic message that is sought to be conveyed.

e. The requirement that dancer performers be separated from their intended audience by a minimum distance of ten (10) feet does not simply make the message as expressed in the dance performance slightly less graphic; it actually effects and significantly alters the message being conveyed.

f. In the context of erotic performance dance, distance is not simply a non-communicative element, but is, actually, an integral part of the content of the expression.

g. The requirement that dance performers be separated from their intended audience by a minimum distance of ten (10) feet is not, in the context of erotic performance dance, unrelated to the content of the expression that is sought to be communicated thereby.

h. Regulations that would require an erotic dance performer to be separated from her intended audience by a minimum distance of ten (10) feet are directed at the

content of the expression as contained in erotic performance dance,

i. In the context of erotic performance dance, distance is part and parcel of the relational and erotic communication sought to be communicated thereby, and is not the mere manner of a performance or incidental conduct thereof.

j. The relational and erotic communication sought to be communicated by erotic performance dance is significantly and substantially effected, reduced, and degraded by the requirement that performers be separated from their intended audience by a minimum distance of ten (10) feet.

DATED at Santa Barbara, California, this 8th day of July, 1996.

/s/ Edward I. Donnerstein
Edward I. Donnerstein

Final Report of the Distance and Message Effectiveness Study

Date: March 18, 1996

Prepared For: Burns & Hammerly
500-108th Ave NE
Suite 770
Bellevue, WA 98004

Prepared by: Dr. Edward Donnerstein and
Dr. Daniel Linz
Department of Communication
University of California
Santa Barbara, CA 93106

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

Distance Requirements 1

Theoretical Background 2

METHOD 3

Design 3

Materials 3

Procedure 5

RESULTS 7

Relational Communication 7

Erotic Communication 8

DISCUSSION 9

REFERENCES 11

LIST OF FIGURES..... 12

INTRODUCTION

The purpose of this study was to determine whether the erotic, relational, and social messages conveyed by erotic dancers are significantly influenced by the variable of distance. Distance in this study is defined as the amount of space between a dancer and a patron. This study was part of a larger project on erotic dance which examined both nudity and distance. In this report, however, we will only discuss the results as they related to distance and those conditions which most resemble the Pierce County ordinance. Specifically, we tested the hypotheses that: 1) dancers who are further away from a patron would communicate a significantly *less* erotic and *less* intimate relational message than dancers closer to the patron. This is in contrast to the statement in *Kev Inc. v. Kitsap County,* 793 F.2d 1053, 1061 (9th Cir. 1986) that "[w]hile the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired."

BACKGROUND

Distance Requirements

Ordinances in Washington state and elsewhere have required that all nude dancing take place at some specified distance from patrons (e.g., At least ten feet from patrons and at least two feet from floor; or 6 feet from

nearest patron, eighteen inches above floor). Also prohibited by various state ordinances is fondling and caressing of patrons and dancers by each other. These ordinances have been considered reasonable time, place manner restrictions allowable under the First Amendment (e.g., *Kev, Inc., v. Kitsap County,* 793 F.2d 1053 9th Cir. 1986; *O'Day et al., v. King County,* 109 Wn. 2d 746, 749 P.2d 142, 1988). While regulations that restrain speech on the basis of content presumptively violate the First Amendment, content neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

Theoretical Background

Social psychological and communication theory would suggest that physical distance makes a difference in our social interactions because of sensory involvement and changed expectations about behavior among the interaction participants. Social science research has demonstrated that we generally agree on four "zones" or distance categories for social interaction. Within each zone different informational cues are available and different expectations arise. These cues and expectations influence how we perceive and provide a frame of reference for interpreting the communication. Zero to 1 and 1/2 feet is considered the "intimate" zone. In this zone sensory involvement is most pronounced. One and 1/2 feet to 4 feet is considered the "personal" zone. Four feet to 10 feet constitutes the "social" zone. At the social level sensory involvement is significantly reduced compared to previous two levels. A distance of 10 to 25 feet is considered the "public" zone. Sensory involvement is greatly

reduced at this level and other objects and people compete with the communicator for attention.

Theoretically speaking, and based upon past empirical research, it may be assumed that relational and erotic messages significantly change as the distance between a dancer and patron increase. In this study we tested the following specific hypothesis: Holding nudity constant, dancers that are 4 feet from a patron will communicate a message which is significantly different than dancers 6 inches from the patron.

The question asked of participants in this study were drafted so as to be both scientifically sound and consistent with applicable law in this case. Questions were drawn from judicial opinions in *Barnes v. Glenn Theatre Inc.* 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) and in *Miller v. Civil City of South Bend,* 904 F2d 1081, 1089 (7th Cir. 1990), as well as psychological and communication theory. For example, using *Miller* we selected the question asking if the dancer's dance was "alluring with a message of temptation" (*Miller v. Civil City of South Bend,* 904 F2d 1081, 1089 (7th Cir. 1990). Experts in dance (Professor Judith Hanna) and relational communication (Dr. Beth LePoire) were consulted for advice on other questions.

METHOD

Subjects

Sixty nine participants in the Little Darlings dance club of Las Vegas were recruited for participation in a

larger study involving the distance and nudity aspects of performance dance.

Design

A 2 X 3 mixed, within-subjects and between-subjects factorial design was employed. The within subjects variable was distance from participant (4 feet, 6 inches, or 6 inches with touch). The two between-subjects variables were nudity (dancer nude or non-nude). For purposes of this report, only the data of those subjects who viewed a nude dancer at a distance of 4 feet or 6 inches were analyzed. These conditions (nudity and no touch) reflect the situation most relevant to the present case.

Materials

Consent form. Participants were asked to read and sign a consent form which read as follows:

> This is to acknowledge that I have been informed that I will be asked to view three adult entertainment dances. Each dance will last approximately 3 minutes. I understand that these dances may involve nudity. I also understand that during the three dances I am not to talk to the dancers and while performing the dancers will not talk to me except to introduce themselves. I also understand that I am not allowed to touch any of the dancers. I further understand that I will be asked to complete a short questionnaire before I see the dances and one or more short questionnaires after I have seen the dances. Your Participation in this study and any answers which you give will be completely *confidential.* I understand that If I have any problems during the study I am to contact any one of the staff personnel who will answer

> any questions or address any concerns I may have. I understand that for my participation, which will last approximately 20 minutes, I will be provided a Deja Vu VIP Card which can be used at Deja Vu clubs nationwide. My signature below indicates that I have freely volunteered for this dance evaluation and understand what I will be asked to do during this evaluation.

Pre-dance questionnaire. Before viewing the erotic dance, participants completed a questionnaire which asked them to report: 1) Business or a personal relationship with anyone that worked in this Little Darling's establishment, Deja Vu dance clubs across the country, or with anyone in the exotic dance industry; 2) If they had heard anything about this study or the specific questions asked; 3) Whether that [sic] had previously visited this Little Darlings club or any club where nude or exotic dancing is offered; and 4) Employment in any capacity in law enforcement. If the participants answered YES to questions 1, 2 or 4, they were to be deleted from the study. No participants answered YES. In addition, demographic information including, age, race, religiosity, marital status, income, political orientation (Conservative-Liberal), and level of education was requested of the participant.

Post-dance questionnaire. After viewing the dances, the participants completed a questionnaire which contained the following items relevant to this study measuring relational, and erotic communication.

1. *Relational communication.* "Did you feel that the dancer was expressing to you through her dance the fantasy that: (a) She wanted to make you feel like you

were a special person? (b) She liked you? (c) She was personally interested in you? (d) She desired you? (e) There was intimacy between the two of you? (f) She wanted to be romantically involved with you?"

2. *Erotic Communication.* "The Dancer's dance was: (a) Passionate. (b) Artistic. (c) Sexy. (d) Erotic. (e) Alluring with a message of temptation. (f) Seductive. (g) Stimulating. (h) Personal."

Each question subcomponent was followed by a "Definitely Yes" to "Definitely No" response scale anchored by the numbers 1 and 8. They were also asked if they had ever had a private one on one dance with this entertainer? If any participant answered YES to this question they were to be eliminated from the analysis, however, none did.

Procedure

The study was conducted at the Little Darlings dance club, Las Vegas, Nevada. Participants visiting the club between 12:00pm and 9:00pm during the week of August 19-23, 1995, were randomly recruited to watch three dances. The recruitment was done by Dr. Dale Kunkel and/or Mr. Tim Gray of the University of California-Santa Barbara. The solicitation of participants used the following outline:

> Hello. My name is _____. I work for a research company that has been hired by the club to study how people react to several different types of dances that they might want to use in the club. We are recruiting participants for the study right now. We need people who are willing to watch three dances we are evaluating.

> Each dance will be done privately for you by a different woman. After you have seen each dancer, you will then be asked to fill out a questionnaire that tells us what you think about each of the dances. If you are willing to participate, I can offer you a VIP card which allows free admission to any Deja Vu club. It will only take about 15-20 minutes to complete the study. Would you like to do this?

After being recruited, three participants at a time were taken to a closed off room in the back of the main club area where they read and signed the Consent form. They were then provided the following instructions about the completion of the Pre-dance questionnaire:

> Before we have you view the dances, we need you to answer a few questions about yourself. All of the information you provide is confidential and fully anonymous. It will never be examined individually. We are interested only in the overall reactions of large groups of people. Please complete this questionnaire and return it to me when you've finished. Let me know if you have any questions. Once you're finished, it will just be a short wait before we begin the dances.

After completing the form, the three participants were taken to an adjoining room where they were to watch the dances. The participants were separated from each other by a partition. Once seated, they were given the following instructions:

> We are going to show you three dances. Each one will be presented by a different performer. It is important that you *do not talk to or touch* any of the dancers. There will be a brief pause between each dance. Please stay seated until the

last dance has been completed. Do not offer the dancers any tips or money. Afterwards, I will give you a questionnaire that asks you how you felt about each of the dances. Remember that we are interested in getting your reaction to each dance that you see. We are not trying to evaluate the women who are dancing. Nothing that you tell us will be used to affect a dancer in any way. Once you have completed the questionnaire, I will give you the special VIP card for future admission to any Deja Vu dance club as our thanks for your help.

Participants then viewed the three dances, one at a time, in random order. Eight dancers were employed and randomly assigned three at a time to distance conditions. The dance routine and the music accompanying the dance were held constant except for variations in distance. The dancers were trained by a professional choreographer to perform exactly the same routine at each distance, save a brief touch to the shoulders and arms under the 6 inch touch distance (this condition is not part of the present report). During any one sequence of three dances, all the dancers performed either Nude or Non-nude. The Nudity condition was reversed for the next sequence. Each dance was 3 minutes in length. All aspects of the dance were identical (e.g., same shoes, costumes, perfume, distance, lighting, music, etc.) except for the distance from the participant and the variable of nudity. All dancers began their routine with a black dress which was removed within seconds of the dance commencing. Dancers in the non-nude condition were clothed in a bra and panty, while those in nude condition did not wear these items of clothing. In the present report only the participants in the nude condition are included.

In order to assure that the dancers were performing the correct routine, Ms. Eva Blumenthal of the University of California-Santa Barbara coordinated the schedules of the dancers and observed all performances.

After viewing the dances, the participants were taken back to the adjoining room where they had completed the earlier consent form. They were given the Post-dance questionnaire by Dr. Kunkel and Mr. Tim Gray, which contained a picture of each of the dancers they had seen. They were also asked if they had ever had a private one on one dance with this entertainer. If they answered YES they were to be eliminated from the analysis. Dr. Kunkel and Mr. Gray explained how to complete the questionnaire and answered any questions the participant had. Subjects were separated in distance in order that they could not view each others responses. Upon completion of the questionnaire, the participant was thanked for their participation and presented the VIP card.

RESULTS

Relational Communication. There were six items which comprised the *Relational Communication* questions. The question and items were as follows:

Did you feel that the dancer was expressing to you through her dance the fantasy that:

1. She wanted to make you feel like you were a special person?

2. She liked you?

3. She was personally interested in you?

4. She desired you?

5. There was intimacy between the two of you?

6. She wanted to be romantically involved with you?

These six items were summed to form a composite measure for *Relational Communication*. A statistical test (Student's t-test) designed to differentiate significant differences between groups from chance differences at the .05 level was employed. We compared participants in the 4 feet distance group versus those who viewed the dancer from 6 inches on the *Relational Communication* measure. This comparison revealed a significant effect for Distance ($p<.05$), with dancers at 6 inches being rated as more expressive overall than their 4 foot counterparts. These results are displayed in **Figure 1**.

Individual analysis on each of the six items showed significant effects on the following questions:

a. She wanted to make you feel like you were a special person ($p<.05$)

b. She liked you ($p<.05$)

c. She was personally interested in you ($p<.05$)

d. There was intimacy between the two of you ($p<.05$)

e. She wanted to be romantically involved with you ($p<.05$)

These results are displayed in **Figure 2**. In all cases, dancers at 6 inches were rated more expressive on each of these items than dancers at 4 feet. The remaining item, while not statistically significant, showed the same pattern of results; and had more participants been used in

this study, the results would have been statistically significant.

Erotic Communication. There were eight items which comprised the *Erotic Communication* questions. The question and items were as follows:

The dancer's dance was:

1. Passionate
2. Artistic
3. Sexy
4. Erotic
5. Alluring with a message of temptation
6. Seductive
7. Stimulating
8. Personal

These eight items were summed to form a composite measure for *Erotic Communication*. A t-test (4 feet vs 6 inches) on the *Erotic Communication* measure revealed a significant effect for Distance ($p<.05$), with dancers at 6 inches being rated as more generally erotic overall than their 4 foot counterparts. These results are displayed in **Figure 1**.

Individual analysis on each of the eight items showed significant effects on the following questions:

a. Alluring with a message of temptation ($p<.05$)

b. Seductive ($p<.05$)

c. Stimulating ($p<.05$)

d. Personal ($p<.05$)

These results are displayed in **Figure 3**. In all cases, dancers at 6 inches were rated as communicating these ideas more so than dancers at 4 feet. The remaining items, while not statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant.

DISCUSSION

Governmental restrictions on distance, when applied to the context of erotic performance dance, are not merely time, place and manner restrictions that have no impact on the content of speech. Distance is, itself, a part of the communication expressed in erotic performance dance. These restrictions are related to the content of erotic performance dance expression, and significantly and substantially alter the content of the message being conveyed by the performer and the meaning ascribed to the dance by the viewer. Significant and substantial changes in the erotic message and relational message is noted when the entertainers move further away from the patron. The present study strongly demonstrated that the effectiveness of the communication as contained in a dancer's performance was significantly altered by the condition of distance. Overall, dancers at 6 inches were seen as expressing a significantly stronger relational and erotic message than dancers at 4 feet. It is our opinion, based upon both empirical and theoretical research in this area, that as the distance increased to 10 feet these effects would be even stronger. There is no question from these studies that the effectiveness and content of these messages are significantly impacted by distance.

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KEV, Inc., v. Kitsap County, 299 F2d 1053 (9th Cir. 1986).

Miller v. Civil City of South Bend, 904 F2d 1081, 1089 (7th Cir. 1990)

O'Day et al., v. King County, 109 Wn 2d 796, 749 P. 2d (1988).

LIST OF FIGURES

Figure 1: Effect of Distance on Combined Communication Scales

Figure 2: Effect of Distance on Relational Communication Items

Figure 3: Effect of Distance on Erotic Communication Items

Figure 1
Effect of Distance on Combined Scales

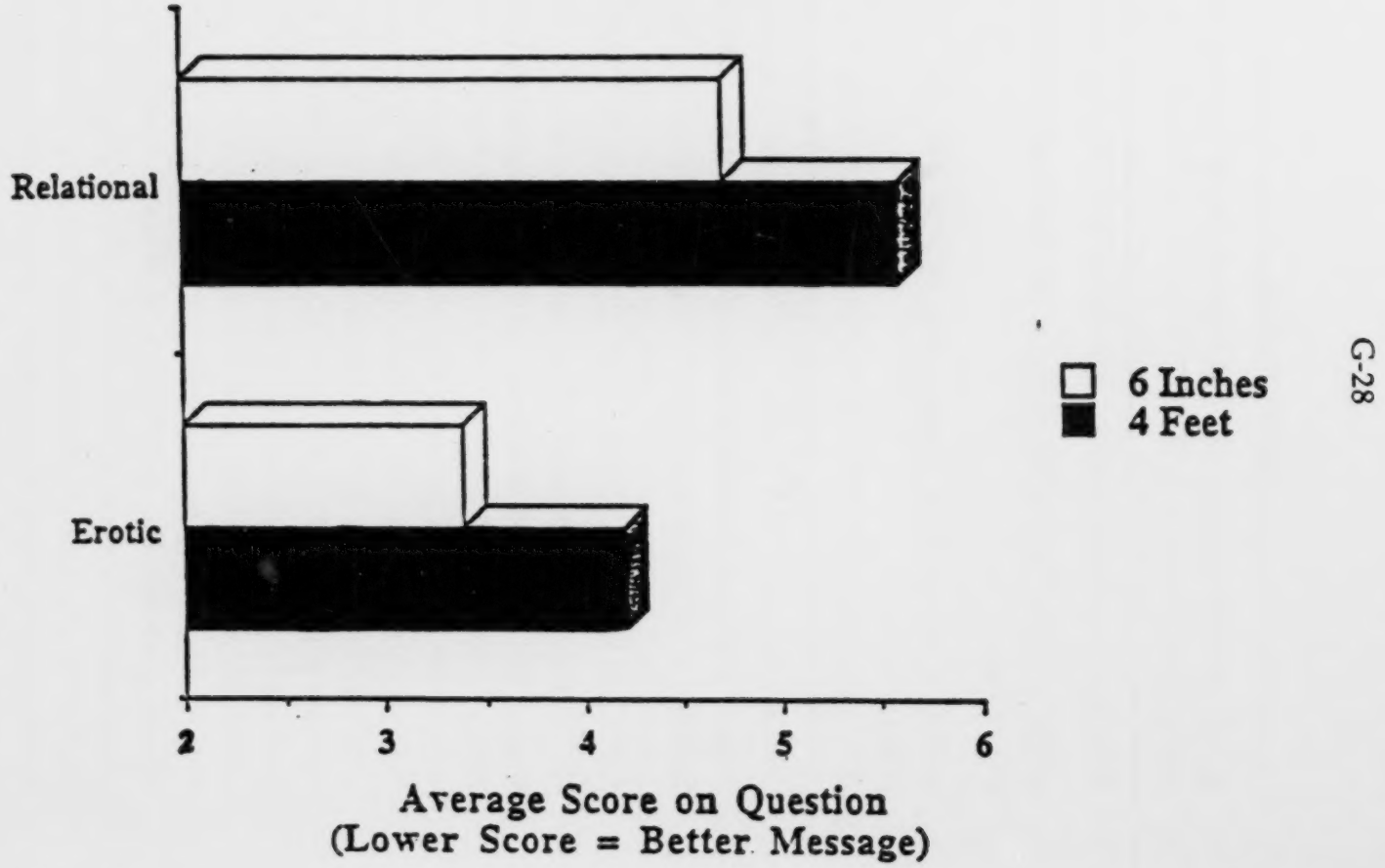


Figure 2
Effect of Distance on Relational Communication Items

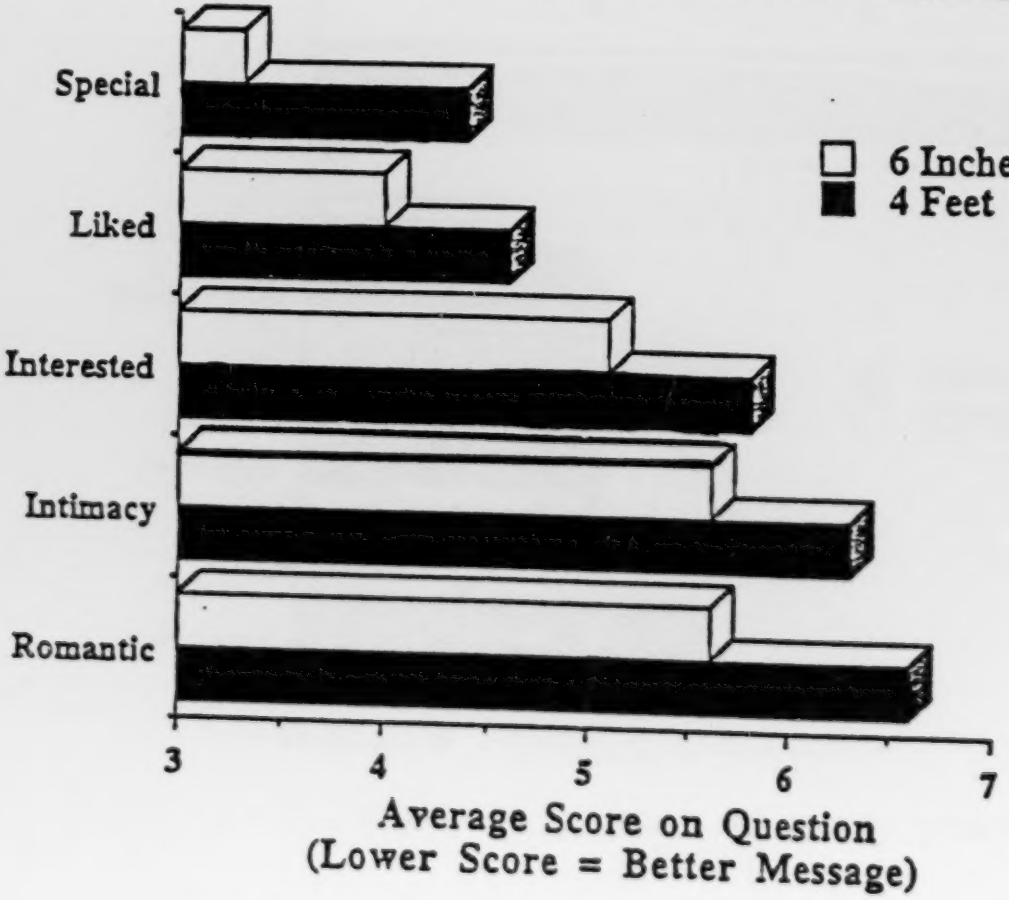
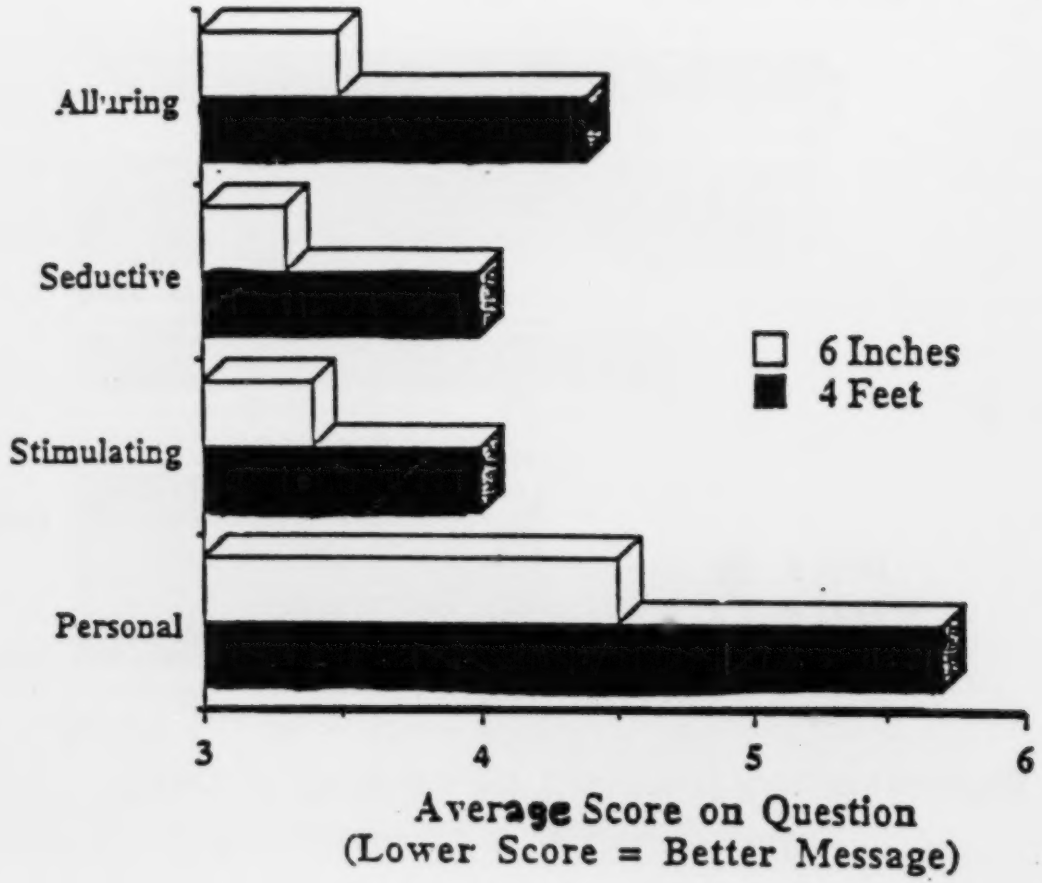


Figure 3
Effect of Distance on Erotic Items



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No. 98-2053

In The

Supreme Court of the United States

FRANK COLACURCIO, JR., DAVID EBERT, AND STEVE FUESTON, d/b/a DDF&S INVESTMENT CO.,

Petitioners,

v.

CITY OF KENT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM P. SCHOEL
Counsel of Record
JAYNE L. FREEMAN
Counsel for Respondent City of Kent
KEATING, BUCKLIN & MCCORMACK
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104
(206) 623-8861

ROGER LUBOVICH
City of Kent
Counsel for Respondent City of Kent
220 Fourth Avenue South
Kent, Washington 98032
(253) 856-6770

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TABLE OF CONTENTS

Page

INTRODUCTION 1

COUNTER STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. NUMEROUS FEDERAL AND STATE CASES HAVE UPHELD DISTANCE REGULATIONS BETWEEN ADULT ENTERTAINERS AND PATRONS, AND NO COURT HAS STRICKEN SUCH A DISTANCE REQUIREMENT AS VIOLATIVE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION 3

II. THIS COURT HAS CLEARLY SET THE LEVEL OF FIRST AMENDMENT PROTECTION FOR SEXUALLY EXPLICIT NON-OBSCENE EXPRESSIVE CONDUCT AND THE STANDARDS FOR MEASURING REGULATIONS OF THAT CONDUCT, THUS REVIEW OF THESE ISSUES IS UNNECESSARY 5

A. CASES HAVE ASSUMED FULL PROTECTION FOR SEXUALLY EXPLICIT NON-OBSCENE SPEECH, AND *DICTA* TO THE CONTRARY DOES NOT WARRANT REVIEW 5

B. EVEN IF THE SEVERAL OPINIONS IN THIS COURT'S DECISION IN *BARNES v GLEN THEATER, INC.*, 501 U.S. 560 (1991) HAVE RESULTED IN CONFUSION IN THE LOWER COURTS, THE NINTH CIRCUIT COURT OF APPEALS, IN RULING ON THE CASE AT BAR, WAS NOT CONFUSED, AND APPLIED AN APPROPRIATE STANDARD 7

TABLE OF CONTENTS – Continued

Page

C. THE ONLY CONFUSION OCCASIONED BY *BARNES* APPEARS TO BE VISITED UPON THE PETITIONERS HEREIN 10

III. THE NINTH CIRCUIT FOLLOWED SUPREME COURT PRECEDENT BY CONSIDERING OBJECTIVE EVIDENCE BUT REFUSING TO RELY ON PERSONAL LEGISLATORS' MOTIVES TO DETERMINE THE PREDOMINANT PURPOSE OF THE CITY'S ORDINANCE..... 14

A. THIS COURT HAS CONSISTENTLY PRECLUDED INQUIRY INTO THE PERSONAL MOTIVES OF INDIVIDUAL LEGISLATORS 15

B. THE NINTH CIRCUIT APPLIED THE STANDARD MOST FAVORABLE TO PLAINTIFFS WHEN DETERMINING THE PREDOMINANT PURPOSE OF KENT'S ORDINANCE 18

IV. THIS COURT HAS APPLIED A CONSISTENT AND CLEAR STANDARD FOR DETERMINING WHETHER A CONTENT-NEUTRAL REGULATION OF EXPRESSIVE CONDUCT IS "NARROWLY TAILORED"..... 20

A. THE ANALYSIS INVOLVING CONSIDERATION OF LESS INTRUSIVE MEANS IS RESERVED FOR CONTENT-BASED REGULATIONS, WHEREAS COURTS ARE URGED TO DEFER TO LEGISLATURES WHEN REVIEWING CONTENT-NEUTRAL REGULATIONS..... 21

TABLE OF CONTENTS – Continued

Page

B. THE COURT'S ANALYSIS SATISFIES THE STANDARD PETITIONERS URGE THIS COURT TO APPLY 23

V. THIS COURT HAS ANNOUNCED A CONSISTENT AND CLEAR STANDARD FOR DETERMINING WHETHER A CONTENT-NEUTRAL REGULATION LEAVES OPEN ADEQUATE ALTERNATIVE MODES OF COMMUNICATION 25

A. LOWER COURTS HAVE AGREED THAT DISTANCE REQUIREMENTS ALLOW ADEQUATE ALTERNATIVE MODES OF EXPRESSION..... 25

B. "UNIQUENESS" ALONE DOES NOT PROHIBIT REGULATION OF EXPRESSIVE CONDUCT 26

CONCLUSION 30

APPENDIX ..... RA 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

44 Liquor Mart, Inc. v Rhode Island, 517 U.S. 484 (1996) 20, 21

Acorn v City of Phoenix, 798 F.2d 1260 (9th Cir. 1986) 28

Avalon Cinema Corp. v Thompson, 667 F.2d 659 (8th Cir. 1981) 18

Barnes v Glen Theater, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) 5, 6, 7, 8, 13, 14, 24

BSA, Inc. v King County, 804 F.2d 1104 (9th Cir. 1986) 3, 12

Carew Reid v Metropolitan Transit Authority, 903 F.2d 914 (2nd Cir. 1990) 28

Church of Lukumi Babalu Aye, Inc. v City of Hileah, 508 U.S. 520 (1993) 16

City of Cincinnati v Discovery Network, Inc., 507 U.S. 410 (1993) 20, 21, 23

City of LaDue v Gilleo, 512 U.S. 43 (1994) 26

City of Las Vegas v Foley, 747 F.2d 1294 (9th Cir. 1984) 19

City of Renton v Playtime Theaters, 475 U.S. 41, 106 S.Ct. 925 (1986) ..... *passim*

Clark v Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) 6, 8, 22, 25, 27

Conroy v Aniskoff, 507 U.S. 511 (1993) 16

DFW Vending v Jefferson Cty., Texas, 991 F.Supp. 578 (E.D. Tex. 1998) 3, 7

TABLE OF AUTHORITIES – Continued

Page

DLS, Inc. v City of Chattanooga, 107 F.3d 403 (6th Cir. 1997) 3, 7

Duran v Sail Inn, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) 5

Faraone v City of East Providence, 935 F.Supp. 82 (D.R.I. 1996) 13

Florida Bar v Went-For-It, Inc., 515 U.S. 618 (1995) 20, 23, 24

Georgia v Cafe Erotica, Inc., 500 S.E.2d 574 (Ga. 1998) 13

Grossbaum v Indianapolis-Marion Cty. Bldg. Auth., 100 F.3d 1287 (7th Cir. 1996) 17

Heffron v International Society for Krishna Consciousness, 452 U.S. 640 (1981) 25, 26, 27

J&B Entertainment v City of Jackson, 152 F.3d 362 (5th Cir. 1998) 17

Kev, Inc. v Kitsap County, 793 F.2d 1053 (9th Cir. 1986) 3, 26

Lakeland Lounge v Jackson, 973 F.2d 1255 (5th Cir. 1992), cert. den. 507 U.S. 1030 (1993) 17

MDII Entertainment, Inc. v City of Dallas, 28 F.3d 492 (5th Cir. 1994) 13

Northwest Enterprises, Inc. v City of Houston, 27 F.Supp.2d 754 (S.D. Tex. 1998) 4, 18

R.A.V. v City of St. Paul, Minn., 505 U.S. 377, 112 S.Ct. 2538 (1992) 29

Reno v ACLU, 521 U.S. 844, 117 S.Ct. 2329 (1997) 10

TABLE OF AUTHORITIES – Continued

Page

Schad v Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) 6

Schenck v Pro-Choice Network of West. N.Y., 117 S.Ct. 855 (1997) 23

Schultz v City of Cumberland, 26 F.Supp.2d 1141 (W.D. Wisc. 1998) 18

SDJ, Inc. v City of Houston, 837 F.2d 1268 (5th Cir. 1988), cert. den. 489 U.S. 1052 (1989) 17

Threesome Entertainment v Strittmather, 4 F.Supp.2d 710 (N.D. Ohio 1998) 4

T-Marc v Pinellas, 804 F.Supp. 1500 (M.D. Fla. 1992) 3

United States v O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) ..... *passim*

University Books & Videos, Inc. v Metropolitan Dade County, 33 F.Supp.2d 1364 (S.D. Fla. 1999) 11, 13

Ward v Rock Against Racism, 491 U.S. 781 (1989) 8, 16, 22, 23

Young v American Mini-Theaters, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) 9, 15

Zanganeh v Hymes, 844 F.Supp. 1087 (D.Md. 1994) 3

STATE CASES

DCR v Pierce County, 92 Wn.2d 660, 964 P.2d 380 (Div. II, 1998) 4, 26

Deja Vu v Federal Way, No. 41818-1-I (Div. I, 1999) 4

TABLE OF AUTHORITIES – Continued

Page

Deja Vu v Spokane County, 1998 WL 104589 (E.D. Wash.) 4

Hamilton Amusement Center v Verniero, 716 A.2d 1137 (N.J. 1998) 13, 14

Ino Ino v Bellevue, 132 Wn.2d 103, 937 P.2d 154 (1997), cert. den. 118 S.Ct. 856, 139 L.Ed.2d 755, 66 U.S.L.W. 3388 .....4, 7, 9, 14, 26

O'Day v King County, 109 Wn.2d 796, 749 P.2d 142 (1988) 4

Pap's Am v City of Erie, 719 A.2d 273 (Pa. 1998), cert. granted, 119 S.Ct. 1753 (U.S. May 17, 1999) (No. 98-1161).....8, 9

Piece Meal Ltd. v Village of Bellwood, WL 211292, at 8-9 (N.D. Ill. 1991)..... 18

Tily v City of Newport Beach, 81 Cal. Rptr.2d 6 (Cal. App. 4th Dist. 1998) 4

STATUTES

Supreme Court Rule 10..... 1

Supreme Court Rule 15(i)..... 2

INTRODUCTION

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. Supreme Court Rule 10. Petitioners have not stated compelling reasons for granting certiorari in this case. *Id.* The Petition should be denied.

COUNTER STATEMENT OF THE CASE

The City of Kent has grappled with issues surrounding the secondary effects of adult entertainment since 1982 when the City conducted a comprehensive study of adult entertainment businesses and their secondary impacts and effects on their surrounding community. *See*, Appendix A, Affidavit of Roger Lubovich and attachments thereto. In the mid-1980's the City of Kent passed both a zoning ordinance and a business ordinance regulating standards of conduct within adult entertainment establishments. *Id.*

After the 1994 federal court decision striking as unconstitutional portions of the City's zoning ordinance relating to adult entertainment establishments, the City considered several proposed zoning amendments designed to comply with federal and state law, and address secondary impacts of adult entertainment establishments. *Id.* The City considered several options then adopted the proposal which included the largest number of potential sites. *Id.* Kent's new zoning ordinance relating to the location of adult entertainment establishments has not been challenged.

The ordinance at issue herein is the result of significant research and further study by the City of Kent into secondary effects of adult entertainment establishments

and the experience of other jurisdictions with adult entertainment establishments. *Id.*, and, *see*, Appendix B, Affidavit of J.P. Covey.

The facts presented in the affidavits of Roger Lubovich and J.P. Covey have been undisputed throughout this proceeding. The Ninth Circuit Court of Appeals affirmed the trial court's dismissal of Petitioners' case as a matter of law, ruling the City of Kent's ten-foot distance ordinance is content-neutral, is narrowly tailored, and leaves open ample alternative avenues for communication of protected expression.[1]

SUMMARY OF ARGUMENT

There is no dispute among the circuits as to whether distance requirements like the City of Kent's are constitutional. Further, the First Amendment issues raised in the Petition are not as confused as Petitioners contend. In any event, the Ninth Circuit analyzed Kent's ordinance under the standards providing the highest level of protection for expressive conduct and, even under these standards, found the City of Kent's ordinance to be constitutional.

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[1] Pursuant to S.Ct.R. 15(i), Respondent points out that Petitioners have misrepresented evidence below. Portions of Petitioners' Appendix E contain reference and quotation from an alleged City Council Planning *Committee* meeting of April 10, 1995. In fact, no such meeting took place. The Planning *Commission* did meet on April 10 and Petitioners' reference would be properly attributed to that meeting. The Planning Commission was a citizenry commission and no City Council members or City officials sat on the Commission. Thus, the quoted comments cannot be attributed to City officials.

ARGUMENT

I. NUMEROUS FEDERAL AND STATE CASES HAVE UPHELD DISTANCE REGULATIONS BETWEEN ADULT ENTERTAINERS AND PATRONS, AND NO COURT HAS STRICKEN SUCH A DISTANCE REQUIREMENT AS VIOLATIVE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

State and federal courts from around the country have uniformly upheld ordinances and/or statutes requiring a distance separation between erotic dancers and their patrons. In 1986 the Ninth Circuit Court of Appeals affirmed a Kitsap County regulation requiring all erotic dancing (nude or semi-nude) to take place at least ten feet from patrons and on a stage raised at least two feet from the floor. *Kev, Inc. v Kitsap County*, 793 F.2d 1053, 1061 (9th Cir. 1986). The Ninth Circuit relied on the then-recent United States Supreme Court case of *City of Renton v Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

That same year the Ninth Circuit also upheld King County and Snohomish County ordinances requiring all nude entertainment to be performed on a stage eighteen inches high and six feet from the nearest patron. *BSA, Inc. v King County*, 804 F.2d 1104, 1110-1112 (9th Cir. 1986). A similar six foot, eighteen inch stage separation requirement was more recently upheld in the Sixth Circuit Court of Appeals. *DLS v Chattanooga*, 107 F.3d 403 (6th Cir. 1997).

Numerous federal district courts from around the country have also upheld regulations requiring significant distance be maintained between nude and/or semi-nude dancers and their patrons. *See, T-Marc v Pinellas*, 804 F.Supp. 1500 (M.D. Fla. 1992) (three foot separation rule); *Zanganeh v Hymes*, 844 F.Supp. 1087 (D.Md. 1994) (six foot distance rule); *DFW Vending v Jefferson Cty., Texas*, 991

F.Supp. 578 (E.D. Tex. 1998) (six foot and eighteen inch stage separation rule); *Northwest Enterprises v City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1998) (three foot separation rule); *Threesome Entertainment v Strittmather*, 4 F.Supp.2d 710 (N.D. Ohio 1998) (six foot and forty-five inch height separation rule); and, *Deja Vu v Spokane County*, 1998 WL 104589 (E.D. Wash.) (four foot separation rule).

Several state courts have also evaluated and upheld distance requirements in the face of constitutional challenges. *Tily v City of Newport Beach*, 81 Cal. Rptr.2d 6 (Cal. App. 4th Dist. 1998) (six foot and eighteen inch height separation requirement); *O'Day v King County*, 109 Wn.2d 796, 749 P.2d 142 (1988) (six foot and eighteen inch height separation requirement); *Ino Ino v Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997), cert. den. 118 S.Ct. 856, 139 L.Ed.2d 755, 66 U.S.L.W. 3388 (four foot separation rule); *DCR v Pierce County*, 92 Wn.2d 660, 964 P.2d 380 (Div. II, 1998) (ten foot and eighteen inch height separation requirement); and, *Deja Vu v Federal Way*, No. 41818-1-I (Div. I, 1999) (four foot separation rule).

A total of fourteen cases have upheld distance requirements between erotic dancers and patrons. Petitioner has not cited a single case where any such distance requirement was struck down upon constitutional challenge. Counsel for the City of Kent has been unable to locate any case striking down a distance requirement on the basis of a constitutional challenge.

Petitioners argue that the case law interpreting First Amendment protection for sexually explicit non-obscene speech or expressive conduct is unclear and therefore this Court should accept review to clarify the proper standards for analysis. The state of the law regarding erotic dance distance requirements and the First Amendment,

however (the only issue presented by Petitioner), is crystal clear: such distance requirements are lawful time, place, manner regulations. Even if some First Amendment analysis issues remain unclear as alleged by Petitioners, the specific issues arising from the case at bar are clear, and this Court should deny the Petition for Writ of Certiorari.

II. THIS COURT HAS CLEARLY SET THE LEVEL OF FIRST AMENDMENT PROTECTION FOR SEXUALLY EXPLICIT NON-OBSCENE EXPRESSIVE CONDUCT AND THE STANDARDS FOR MEASURING REGULATIONS OF THAT CONDUCT, THUS REVIEW OF THESE ISSUES IS UNNECESSARY.

A. CASES HAVE ASSUMED FULL PROTECTION FOR SEXUALLY EXPLICIT NON-OBSCENE SPEECH, AND *DICTA* TO THE CONTRARY DOES NOT WARRANT REVIEW.

Petitioners allege the Ninth Circuit and many other courts have posited that the standard of review applicable to government restriction of sexually explicit, non-obscene expression is unclear. Petitioners cite to learned treatises for the proposition that from time-to-time courts have opined that sexually explicit non-obscene speech enjoys less than full First Amendment protection.

It is true that several Supreme Court cases contain language suggesting that nude dancing may not be entitled to full First Amendment protection. For example, in *Barnes v Glen Theater*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (citing *Duran v Sail Inn*, 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975)), this Court cited previous decisions, stating "[A]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v LaRue* [citation omitted] that this form of entertainment might be entitled to First and Fourteenth

Amendment protection under some circumstances." 111 S.Ct. at 2460. The Court also acknowledged a similar statement from *Schad v Mount Epraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981) where the Court stated "[f]urthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation". *Id.* In fact, the plurality in *Barnes* stated that "Nude dancing of the kind sought to be performed here is expressive conduct within the outer parameters of the First Amendment, though we view it as only marginally so". *Id.*

Notwithstanding these statements *in dictum*, the Supreme Court and other courts have used First Amendment analysis relating to political and public speaking to evaluate government regulations concerning nude dancing. (*Barnes v Glen Theater, supra* (plurality and Justice Souter concurring using analysis set forth in *United States v O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)); *City of Renton v Playtime Theaters*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (utilizing "appropriate inquiry" from *Clark v Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)).

United States v O'Brien analyzed the issue of whether the burning of a draft card was protected by the First Amendment as expressive conduct in protesting the United States government's policies relating to the war in Vietnam, and in *Clark v Community for Creative Non-Violence*, the Court evaluated a ban on overnight sleep-ins in symbolic tents at LaFayette Park to draw attention to the plight of the homeless. It is difficult to imagine two forms of expression that would be entitled to more protection than those analyzed by the United States Supreme Court in *United States v O'Brien* and *Clark v Community for Creative Non-Violence*. The analysis from these cases have

been utilized in evaluating government regulation regarding nude dancing. *See, example, Ino Ino, Inc. v Bellevue*, 132 Wn.2d 103, 127-128, 937 P.2d 154 (1997), cert. den. 118 S.Ct. 856, 139 L.Ed.2d 755, 66 U.S.L.W. 3388, 66 U.S.L.W. 3470, 66 U.S.L.W. 3472 (Jan. 20, 1998); *DLS, Inc. v City of Chattanooga*, 107 F.3d 403, 410 (6th Cir. 1997) (utilizing the *O'Brien* test and acknowledging that both Justice Souter and the plurality applied the *O'Brien* test in the *Barnes* case); *DFW Vending, Inc. v Jefferson Cty., Texas*, 991 F.Supp. 578, 591 (E.D. Tex. 1998) (applying the *O'Brien* test in upholding a six foot and eighteen inch height separation requirement between dancers and their patrons).

Thus, while some *dicta* has suggested lesser First Amendment protection for nude dancing, courts have uniformly applied time, place, manner analysis applicable to protected expressive conduct to nude dancing, thus this Court need not accept review to clarify what standard of protection should be utilized in analyzing regulations of nude dancing. The standard is clear, has been uniformly used by courts in addressing similar issues, and has provided a level of protection for nude dancing equivalent to political speech.

B. EVEN IF THE SEVERAL OPINIONS IN THIS COURT'S DECISION IN *BARNES v GLEN THEATER, INC.*, 501 U.S. 560 (1991) HAVE RESULTED IN CONFUSION IN THE LOWER COURTS, THE NINTH CIRCUIT COURT OF APPEALS, IN RULING ON THE CASE AT BAR, WAS NOT CONFUSED, AND APPLIED AN APPROPRIATE STANDARD.

As Petitioners appropriately point out, most courts have followed the "narrowest grounds" rule for determining the holding of a case with no majority opinion and have thus treated Justice Souter's concurring opinion

in *Barnes* as controlling authority. In fact, with regard to applicable standards and tests for determining whether a regulation is an appropriate time, place, manner regulation, Justice Souter agreed with the plurality decision in *Barnes* that the four-part inquiry described in *United States v O'Brien, supra,* was the appropriate standard to be applied. 501 U.S. at 582.

Courts applying the *United States v O'Brien* test to regulations relating to nude dancing are following the appropriate standard whether adopted from the plurality decision or Justice Souter's concurring opinion in *Barnes v Glen Theater*. The Ninth Circuit did exactly that in the case at bar utilizing the test as enunciated in *Ward v Rock Against Racism,* 491 U.S. 781, 789, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), but then acknowledging that the Supreme Court has determined that the test stated in *Ward v Rock* is "similar or identical to the *O'Brien* test generally applied to regulations affecting symbolic speech". 163 F.3d at 551.[2]

If other lower courts have failed to utilize the proper test in determining a standard to be applied to time, place, or manner restrictions, the appropriate relief would be for the Court to accept review of a case wherein the court utilized an inappropriate standard: not acceptance of review of this case where the lower court did apply an appropriate standard. In fact, the Court has done this by already accepting review of *Pap's Am v City of Erie,* 719 A.2d 273, 279-80 (Pa. 1998), cert. granted, 119 S.Ct. 1753 (U.S. May 17, 1999) (No. 98-1161).

Petitioners also devote a page of their Petition to a discussion of other lower courts' alleged misreading of Justice Scalia's concurring opinion in *Barnes*. While these

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[2] Citing *Clark v Community For Creative Non-Violence,* 468 U.S. 288, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

observations may point out that other lower court decisions evaluating public nudity bans are ripe for review by this Court, for example, *Pap's, supra*, they do not suggest the case at bar is appropriate for review. The Ninth Circuit Court of Appeals did not follow Justice Scalia's concurring opinion in ruling on the distance rule at issue herein and not even the Petitioner suggests that Justice Scalia's concurring opinion in *Barnes* represents the law of that case.

Petitioners next allege that Kent's distance regulation is a "content-based" regulation, and therefore the Court should subject the regulation to the strictest scrutiny. Petitioners' bald allegation to this effect ignores this Court's previous decisions in several cases including *City of Renton v Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). In the *Playtime Theaters* case, this Court determined that a regulation is "content-neutral" if it is "justified without reference to the content of the regulated speech", rather than designed to prohibit protected speech because of disagreement with the message it conveys. 475 U.S. at 46, 48-49.

Regulations that apply to a particular category of speech or expressive conduct because of troublesome secondary effects that are associated with that type of speech/conduct are still properly characterized as content-neutral, as long as the regulations are justified without reference to the content of that speech. 475 U.S. at 49-50 (citing *Young v American Mini-Theaters, Inc.*, 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976)). Distance requirements have been considered "content-neutral" in numerous cases including a recent case wherein this Court declined review. *See, Ino Ino, Inc. v Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997), cert. den. 118 S.Ct. 856, 139 L.Ed.2d 755, 66 U.S.L.W. 3388, 66 U.S.L.W. 3470, 66 U.S.L.W. 3472 (U.S. Wash. Jan. 20, 1998) (No. 97-858).

As can be seen in the Appendices hereto, the City of Kent's distance regulation was designed to combat the undesirable, criminal secondary effects associated with close proximity erotic dancing, and thus must be considered content-neutral. Such regulations have consistently been held to be "content-neutral". This Court should not grant review to revisit this issue.

C. THE ONLY CONFUSION OCCASIONED BY *BARNES* APPEARS TO BE VISITED UPON THE PETITIONERS HEREIN.

Petitioners allege that as a result of the "lack of clear guidance" on the level of protection afforded expressive conduct some courts have concluded that laws aimed at adult entertainment are automatically considered content-neutral, while this Court's decision in *Reno v ACLU*, 521 U.S. 844, 117 S.Ct. 2329 (1997) makes clear that restrictions on sexually explicit non-obscene speech can be content-based. What Petitioners have done in this section of their Petition (*see*, pages 9-11) is what Petitioners do throughout their Petition: take a number of separate and distinct Supreme Court decisions analyzing different First Amendment issues, throw them in a single bowl and then by comparing apples with oranges allege that First Amendment analysis is confused, thus the Court should accept review of this case. To paraphrase this Court in *Reno v ACLU*, however, a close look at the cases cited by Petitioners relieves – rather than raises – any uncertainty concerning the proper standard to be applied to the City of Kent's distance requirement.

In *Reno v ACLU, supra*, for example, the government regulation (Communications Decency Act of 1996 – CDA) criminalized transmission of messages of sexual or excretory activities or organs to recipients under 18 years of age. This Court properly reviewed the CDA as a content-

based regulation as the regulation involved pure speech (as opposed to expressive conduct) and because it was a blanket restriction on the speech itself. In discussing the *Renton v Playtime Theaters* case, the Court recognized that the CDA applied broadly to the entire universe of cyberspace and the purpose of the CDA was to protect children from the primary effects of indecent speech rather than any secondary effects of such speech. 521 U.S. at 867-868. The Court described the CDA as a content-based blanket restriction on speech. *Id.*

In other words, the CDA was a complete ban of a broad type of message throughout cyberspace. In the case at bar, no message or dance is prohibited, a distance between the dancer and the patron is merely required.[3]

Another example of Petitioners' confusion is their citation to *University Books & Videos, Inc. v Metropolitan Dade County*, 33 F.Supp.2d 1364 (S.D. Fla. 1999) for the proposition that any regulation relating to adult entertainment is automatically "content-neutral". This representation of the case is incorrect. In the *University Books* case, Dade County passed a zoning ordinance requiring adult entertainment business establishments to locate 1,000 feet from schools, parks, daycare centers, etc. (In other words, the same buffer zone as was at issue in *Renton v Playtime Theaters*.) The court noted that the zoning ordinance was passed to reduce adverse secondary effects associated with certain specified adult entertainment establishments. 33 F.Supp.2d at 1367. The court recognized its need to determine whether the regulation

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[3] Additionally, the CDA was extraordinarily vague and ambiguous, while the City of Kent's distance regulation is straight forward, clear, and narrowly tailored to address the secondary effects identified by the City of Kent prior to passage of the legislation. *See*, Appendices A and B.

was content-neutral and ruled that such zoning regulations had previously been determined to be content-neutral by the United States Supreme Court (*see, City of Renton v Playtime Theaters*). 33 F.Supp.2d at 1369.

In other words, the Florida district court was following precedent not making an improper assumption of content-neutrality. As this Court stated in *Renton v Playtime Theaters*, governmental jurisdictions can rely on other jurisdictions' findings concerning secondary effects. Petitioners apparently see a reinvention of the wheel for every single case touching upon any First Amendment protected activity. Such a re-litigation of the same issue would be an obvious waste of judicial time and energy.

Further, in the case at bar, the Ninth Circuit Court of Appeals did not assume secondary effects of close proximity dancing in order to find Kent's ordinance to be content-neutral. Rather, the court – and the district court below – was presented with significant study and research conducted by the City of Kent revealing the secondary effects of close proximity nude and semi-nude dancing. *See*, Appendices A and B. Thus, Petitioners would not benefit from review of this case as the Ninth Circuit Court of Appeals conducted the most thorough legal analysis and had substantial evidence of secondary effects before it in making its decision in this case.

This Court, the Ninth Circuit Court of Appeals, and other courts from around the country have also previously recognized the government's substantial interest in curbing secondary effects of adult entertainment. *See, e.g., City of Renton v Playtime Theaters, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (holding that the City of Renton had a substantial interest in combatting the undesirable secondary effects of adult theaters, such as crime and a drop in property values), *reh'g. den.* 475 U.S. 1132

(1986); *Barnes, supra,* 501 U.S. at 582 (Souter, J., concurring) (stating that the government interest in combatting secondary effects of adult entertainment establishments is substantial, and listing the effects as encouraging prostitution, increase in sexual assaults, and attracting other criminal activity); *BSA, Inc. v King County,* 804 F.2d 1104, 1111 (9th Cir. 1986) (recognizing sexual contact as a secondary effect of adult entertainment).

In the zoning context and in the distance rule between dancer and patron context, numerous courts have already seen and recognized evidence of secondary effects. Therefore, even if several courts have assumed secondary effects of adult entertainment establishments and close proximity dancing therein, these courts rely on precedent, just as governmental jurisdictions are allowed to rely on the experience of other jurisdictions to show that their ordinances further the substantial interest in curbing secondary effects. *See, Playtime Theaters, Inc.,* 475 U.S. at 50-51. (*See,* example *University Books & Videos, Inc. v Metropolitan Dade County,* 33 F.Supp.2d 1364 (S.D. Fla. 1999), cited by Petitioners at page 10 of their Petition.)

Several of the other cases Petitioners cite at pages 10 and 11 of their Petition involve commercial speech, and thus are inapposite to the case at bar (*see, MDII Entertainment, Inc. v City of Dallas,* 28 F.3d 492, 494 (5th Cir. 1994) and *Hamilton Amusement Center v Verniero,* 716 A.2d 1137 (N.J. 1998)) while other cases involve issues which may never have been addressed by previous decisions (*Faraone v City of East Providence,* 935 F.Supp. 82 (D.R.I. 1996) (questioning whether there are secondary effects from the Sunday rental of adult videos) and *Georgia v Cafe Erotica, Inc.,* 500 S.E.2d 574 (Ga. 1998) (questioning whether there are secondary effects on 18-21 year olds as prohibited from adult entertainment cabarets)).

Petitioners' artful mixture of apples and oranges in the fruit bowl does not suggest that courts are confused about the standards applied in *Barnes* or other Supreme Court cases.

Petitioners also suggest that this Court accept review even if the Ninth Circuit panel correctly applied constitutional standards and correctly decided the case at bar. The Ninth Circuit's decision herein, however, does not conflict with other Court of Appeals' decisions or United States Supreme Court decisions. Further, it does not conflict with Washington State Supreme Court decisions. In fact, this Court has already refused review of a Washington State Supreme Court decision which decided the very issues presented by Petitioners. *See, Ino Ino, Inc. v City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997), cert. den. 118 S.Ct. 856, 139 L.Ed.2d 755, 66 U.S.L.W. 3388, 66 U.S.L.W. 3470, 66 U.S.L.W. 3472 (U.S. Wash. Jan. 20, 1998) (No. 97-858).

III. THE NINTH CIRCUIT FOLLOWED SUPREME COURT PRECEDENT BY CONSIDERING OBJECTIVE EVIDENCE BUT REFUSING TO RELY ON PERSONAL LEGISLATORS' MOTIVES TO DETERMINE THE PREDOMINANT PURPOSE OF THE CITY'S ORDINANCE.

Petitioners urge the Court to accept review to clarify the amount of evidence courts should consider in analyzing a government's "predominant purpose" behind legislation. However, this standard is not as unclear as Petitioners claim.[4] In any event, although the Ninth

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[4] In fact, the Court recently denied certiorari in *Hamilton Amusement Ctr. v Verniero*, 67 U.S.L.W. 3459, 1999 WL 14855 (June 21, 1999), which Petitioners cite as an example of a case in which the court applied a very low standard, deeming a regulation content-neutral without any evidence of secondary effects.

Circuit commented on the lack of a clear standard for evaluating evidence, the court went on to consider *all* evidence in the record in analyzing whether the Kent ordinance was content-neutral.

A. THIS COURT HAS CONSISTENTLY PRECLUDED INQUIRY INTO THE PERSONAL MOTIVES OF INDIVIDUAL LEGISLATORS.

Petitioners concede that *United States v O'Brien*, 391 U.S. 367 (1968) prohibits striking down an otherwise constitutional statute on the basis of an alleged illicit legislative motive on the part of individual legislators. Petitioner's Brief, at p. 14. Yet that is exactly what Petitioners want the Court to do.

Petitioners argue that the *O'Brien* principle was modified by *City of Renton v Playtime Theaters, Inc.*, 475 U.S. 41 (1986). Under *Renton*, a regulation is "content-neutral" if it is "justified without reference to the content of the regulated speech", rather than designed to prohibit protected speech because of disagreement with the message it conveys. *Id.*, 475 U.S. 46, 48-49. Regulations that apply to a particular category of speech because of troublesome secondary effects that happen to be associated with that type of speech or conduct are still properly characterized as *content-neutral*, as long as there is a justification for passing the regulation without reference to the message conveyed. *Id.*, 475 U.S. at 49-50 (citing *Young v American Mini-Theaters, Inc.*, 427 U.S. 50, 96 S.Ct. 2440 (1976)). To determine whether a regulation is so justified, *Renton* instructs courts to determine what the regulation is designed to do (*i.e.*, "the purpose" of the regulation). *See, Id.*, 475 U.S. at 48-49.

The test for determining whether a regulation is "content-neutral" announced in *Renton* does not modify the *O'Brien* rule with respect to the motives of legislators.

In fact, the *Renton* court expressly rejected the argument that an ordinance could be invalidated if the court determined that a desire to restrict exercise of First Amendment rights was "a motivating factor" in enacting the ordinance. *Renton*, 475 U.S. at 47-48. Rather, to determine content-neutrality, a court should consider whether an ordinance is actually designed to further a legitimate, enunciated government purpose (*i.e.*, "The ordinance by its terms is designed to prevent crime . . . "), rather than designed to prohibit expression of a certain message (*i.e.*, "Government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"). *Id.*, 475 U.S. at 48-49.

Subsequent Supreme Court decisions have reaffirmed that the "governmental purpose" a court may consider when determining content-neutrality means the government interest served by the legislation, not the subjective motivations of individual legislators. *See, Ward v Rock Against Racism*, 491 U.S. 781, 791 ("The government's purpose is the controlling consideration. A regulation that *serves purposes unrelated to the content of expression* is deemed neutral, even if it has an incidental effect on some speakers or messages but not others") (emphasis added); *Conroy v Aniskoff*, 507 U.S. 511, 519 (1993) ("We are governed by laws, not by the intentions of legislators") (Scalia, J., concurring in judgment); *Church of Lukumi Babalu Aye, Inc. v City of Hileah*, 508 U.S. 520, 533, 542 (1993) (determining ordinances "had as their object the suppression of religion" by analyzing text and effect of the ordinances, but not analyzing the motive behind the ordinances).

Further, federal Courts of Appeals have not had as much difficulty applying the standards as Petitioners claim, nor have they varied greatly in their analysis of the

issue. In *SDJ, Inc. v City of Houston*, 837 F.2d 1268 (5th Cir. 1988), *cert. den.* 489 U.S. 1052 (1989), the Fifth Circuit aptly explained that, under the standard announced in *City of Renton, supra*, a

> City may establish its "substantial interest" in the regulation by compiling a record with *evidence that it may be 'reasonably believed to be relevant to the problem that the City address.'* . . . We do not ask whether the regulator subjectively believed or was motivated by other concerns, but rather whether an objective law maker could have so concluded, supported by an actual basis for the conclusion. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities.

SDJ, 837 F.2d at 1274.

Further, in *Grossbaum v Indianapolis-Marion Cty. Bldg. Auth.*, 100 F.3d 1287, 1293 (7th Cir. 1996), which Petitioners cite as skeptical of the *O'Brien* rule on motive, the Seventh Circuit goes on to outline the valid reasons for refraining from second-guessing the motives of legislators. The court denounced the amount of time and money spent on trying to establish an improper motive – stating "this motive game is not worth the candle" – and went on to rule that a content-neutral speech regulation "pass[es] constitutional muster regardless of motive . . . ". *Id.*, at 1295.[5]

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[5] *See, also, Lakeland Lounge v Jackson*, 973 F.2d 1255, 1259 (5th Cir. 1992), *cert. den.* 507 U.S. 1030 (1993) (council's awareness of information upon which staff relied when framing ordinance reflects that a reasonable legislature with constitutional motives could have enacted the ordinance); *J&B Entertainment v City of Jackson*, 152 F.3d 362, 373 (5th Cir. 1998) ("We do not ask whether the regulator subjectively believed or was motivated by other concerns, but whether an objective lawmaker could have so concluded, supported by an actual basis for the conclusion").

Even Petitioner's description of various lower court decisions[6] support a similar understanding of the rules set forth in *O'Brien* and *Renton*. For example, in *Northwest Enterprises, Inc. v City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1998), the court did not strike down a regulation based on statements by council members. Rather, the court determined that the ordinance was not "justified" by any evidence indicating that the council actually had a basis for enacting the ordinance for the purpose of addressing negative secondary effects of adult businesses. *Id.*, at 779. Similarly, in *Avalon Cinema Corp. v Thompson*, 667 F.2d 659, 661 (8th Cir. 1981) and *Piece Meal Ltd. v Village of Bellwood*, WL 211292, at 8-9 (N.D. Ill. 1991), both courts found that legislative bodies had failed to offer any objective evidence of a legitimate government interest that would justify the ordinance.[7]

B. THE NINTH CIRCUIT APPLIED THE STANDARD MOST FAVORABLE TO PLAINTIFFS WHEN DETERMINING THE PREDOMINANT PURPOSE OF KENT'S ORDINANCE.

Petitioners claim the Ninth Circuit ignored many objective indicators Plaintiffs introduced in this case to demonstrate that the government's alleged purpose was unconstitutional. *See*, Petition, at p. 20. On the contrary,

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[6] *See*, Petition, pp. 17-20.

[7] *See, also, Northwest Enterprises, Inc. v City of Houston, supra* (the court should consider evidence in legislative record to determine whether city council members had reasonable basis for believing regulation would address negative secondary effects attributable to sexually oriented businesses in Houston); *Schultz v City of Cumberland*, 26 F.Supp.2d 1141, 1128 (W.D. Wisc. 1998) ("the court does not ask why defendant actually enacted its ordinance; it asks whether defendant has offered evidence that it would have enacted it for a content-neutral reason").

the Ninth Circuit took the more liberal approach urged by Petitioners, looking at the *full record* "To determine whether evidence indicates that the purpose of the ordinance is to suppress speech or ameliorate secondary effects." *See*, Petition, App. A, at A-11. In doing so, the court relied on all "objective indicators" of purpose, including

> . . . The 'face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings.'

Id. (quoting *City of Las Vegas v Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984)).

Over objection by the City, the court even considered statements by City officials to determine if they revealed "objective manifestations of an illicit purpose". *Id.*, at A-12.[8] The court also considered the entire record reflecting the history of the City's regulatory approach to adult businesses, the circumstances surrounding the City's adoption of the ten foot rule, and the documented evidence of secondary effects that was before the Council. The court discussed a great deal of this evidence in its opinion. In response to Plaintiff's argument that the City of Kent had a pattern of adopting the most restrictive adult entertainment regulations, the court found "This contention is rebutted by the record". *Id.*, at A-12.

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[8] To this extent, if the Court does grant certiorari in this case, the City would urge the Court to once again clarify that statements by City officials or other legislators should *not* be taken into consideration when determining whether a regulation serves a content-neutral purpose. Such a determination can and should be made by reviewing objective evidence in the record that reflects whether or not a given ordinance is designed to serve an actual legitimate government purpose without reference to the content of a certain message.

Based on this evidence, the court concluded that the Kent ordinance was *justified* without reference to speech. *Id.*, at A-14. That is, the City of Kent was justified in implementing a ten foot distance requirement in strip clubs, just like many neighboring counties and cities had, in an attempt to ameliorate secondary effects associated with close-proximity nude dancing.

This ordinance, which only regulates the location where certain conduct may take place, does not "refer to speech" – *i.e.*, it does not foreclose or regulate the expressions of certain ideas or messages that may be communicated through dance in favor of different viewpoints. The Ninth Circuit properly applied the standards that have been set forth by the Supreme Court to determine that Kent's ordinance is, therefore, content-neutral.

IV. THIS COURT HAS APPLIED A CONSISTENT AND CLEAR STANDARD FOR DETERMINING WHETHER A CONTENT-NEUTRAL REGULATION OF EXPRESSIVE CONDUCT IS "NARROWLY TAILORED".

Petitioners argue that consideration of whether a regulation is "narrowly tailored" necessarily implies that courts must consider *all* less restrictive alternatives when determining whether the test is satisfied. To further this end, Petitioners suggest the Court review this case to determine whether the "reasonable fit" test applied in "commercial speech" cases such as *City of Cincinnati v Discovery Network, Inc.*, 507 U.S. 410, 416 (1993), *44 Liquor Mart, Inc. v Rhode Island*, 517 U.S. 484, 529 (1996), and *Florida Bar v Went-For-It, Inc.*, 515 U.S. 618, 632 (1995), should be applied to determine whether a "content-neutral" regulation satisfies the *O'Brien* time, place, and manner test.

Petitioner urges adoption of this test primarily because the Court has, in some cases, given more consideration to the nature and existence of less burdensome alternatives, rather than deferring to the wisdom of the legislature, as has been recommended in other cases applying the time, place and manner test. The Court should reject Petitioner's request for review in order to apply this test.

A. THE ANALYSIS INVOLVING CONSIDERATION OF LESS INTRUSIVE MEANS IS RESERVED FOR CONTENT-BASED REGULATIONS, WHEREAS COURTS ARE URGED TO DEFER TO LEGISLATURES WHEN REVIEWING CONTENT-NEUTRAL REGULATIONS.

The commercial speech cases cited by Petitioner involved regulations that completely banned *speech*, based on its *content* (*i.e.*, message). *See, 44 Liquor Mart*, 517 U.S. at 504 (price advertising ban at issue "constitute[d] a blanket prohibition against truthful, non-misleading speech about a lawful product"); *Discovery Network, Inc.*, 507 U.S. at 429 (banning particular types of newsracks was solely "content-based", as application of the ban was determined by the content of the publication resting inside the newsrack).

These cases involved review of regulations that were *content-based*, thus warranting stricter review of the scope of the regulation and its effect on free speech. *See, 44 Liquor Mart*, 517 U.S. at 512 ("government may not suppress speech as it may suppress conduct"). On the other hand, the Kent ordinance at issue in this case regulates *conduct* that happens to contain an element of expression. The Kent ordinance is also *content-neutral* (*i.e.*, not designed to foreclose a particular message).

As opposed to the analysis applied to content-based regulations, in applying the *O'Brien* analysis to content-neutral regulations of expressive conduct, this Court has given deference to local legislatures to determine the details of how a particular governmental interest is best furthered by a particular regulation.

For example, in *Clark v Community for Creative Non-Violence*, 468 U.S. 288 (1983), this Court recognized that the "narrow tailoring" analysis does not require a reviewing court to second-guess the means adopted by legislative enactment:

> We do not believe, however, that either *United States v O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Parks Service as the manager of the nation's parks or endow the judiciary with the competence to judge how much protection of parklands is wise and how that level of conservation is to be attained.

Id., 468 U.S. at 299. *See, also, City of Renton v Playtime Theaters*, 475 U.S. 41, 52, 106 S.Ct. 925, 931 (1986).

In adopting a regulation that is narrowly tailored, the government is not required to choose the "least restrictive means" or the "least restrictive alternative". *Ward v Rock Against Racism*, 491 U.S. 781, 798-99 (1989). As long as the "means chosen are not *substantially* broader than necessary to achieve the government's interest, the regulation does not violate the First Amendment simply because a court later concludes that the government's interest *could be* adequately served by some less restrictive alternative". *Id.*, at 800 (emphasis added).

Contrary to Petitioners' assertion, this does not necessarily imply that a reviewing court must pour through evidence on every other possible alternative means to

determine whether a given regulation is "narrowly tailored". In fact, this Court rejected such a notion in *Ward v Rock Against Racism*, 491 U.S. 781, 800 (1989).[9]

Whether a regulation burdens *substantially* more speech than necessary is often clear from the record, and can generally be determined by simply reviewing the regulation and the government interest it is designed to promote. Even assuming some narrower alternatives exist, the court can find as a matter of law that speech is not burdened *substantially* beyond the scope of the interest the regulation serves. Further, where narrower alternatives have already been tried and have failed, as was the case in Kent,[10] rehashing these other alternatives is pointless.

B. THE COURT'S ANALYSIS SATISFIES THE STANDARD PETITIONERS URGE THIS COURT TO APPLY.

Even in commercial speech cases involving content-based regulations, the Court has stated only that the existence of "numerous and obvious less burdensome alternatives to the restriction on commercial speech" would be relevant in determining whether the "fit" between the ends and means is reasonable. *Discovery Network*, 416 U.S. 410, 417, n. 13; *Went-For-It, Inc.*, 515 U.S.

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[9] *See, also, Schenck v Pro-Choice Network of West. N.Y.*, 117 S.Ct. 855, 868-9 (1997) ("Although one might quibble about whether fifteen feet is too great or too small a distance [for buffer zones around abortion clinics] . . . we defer to the district court's reasonable assessment of the number of feet necessary . . . " to achieve its goal).

[10] The Ninth Circuit noted in its decision that the narrower regulations suggested by Petitioner (pp. 23-24 of Petition) had already proved to be ineffective. *See*, Petition, A-17.

618, 632. This case would not warrant review to apply this standard as, even if it were applied, this simply is not a case in which "numerous and obvious less burdensome alternatives" exist.

Petitioners argue that the Ninth Circuit did not seriously consider whether a "no touch" rule would more directly serve the City's interests. Although not required to do so, the Ninth Circuit *did* address this argument and concluded, based on the record, that this less restrictive alternative was not "reasonable", as a similar rule had already failed to serve the legitimate governmental interests identified by the City.

Further, lower courts that have addressed this issue have agreed that distance requirements like Kent's are "narrowly tailored" to meet the government's interest in combatting the secondary effects of close-proximity nude dancing.[11] Interestingly enough, even the four dissenting Supreme Court Justices in *Barnes v Glen Theater, Inc.*, 501 U.S. 560 (1991) arguing *against* a state-wide ban on public nudity, *recommended* that *distance requirements* would be appropriately tailored to further the government's interest in protecting public health and safety:

> If the State is genuinely concerned with prostitution and associated evils . . . it can adopt restrictions that do not interfere with the expressiveness of non-obscene nude dancing performances. For instance, *the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators* . . .

Barnes, 501 U.S. at 594 (dissenting opinion) (emphasis added).

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[11] *See, e.g.*, cases cited *supra*, at pp. 3-4.

In light of this instruction by the Court, and the agreement among lower courts that such regulations are "narrowly tailored", there is nothing about the facts of this case that warrants Supreme Court review on this issue.

V. THIS COURT HAS ANNOUNCED A CONSISTENT AND CLEAR STANDARD FOR DETERMINING WHETHER A CONTENT-NEUTRAL REGULATION LEAVES OPEN ADEQUATE ALTERNATIVE MODES OF COMMUNICATION.

A. LOWER COURTS HAVE AGREED THAT DISTANCE REQUIREMENTS ALLOW ADEQUATE ALTERNATIVE MODES OF EXPRESSION.

The final requirement for a valid regulation of expressive conduct under the *O'Brien* analysis is that a content-neutral time, place, and manner regulation leave open "ample alternative channels for communication of the information" that is sought to be expressed. *Clark v Community For Creative Non-Violence*, 468 U.S. 288, 293 (1983); *see, also, Heffron v International Society for Krishna Consciousness*, 452 U.S. 640, 647-48 (1981).

It is well-established that local governments may restrict expressive activity as long as *alternative* modes of communication are available to those who wish to express a particular message. *Renton*, 475 U.S. at 54-5. There is no dispute among the federal circuits or state courts as to whether a distance set-back for dancing at strip clubs leaves open sufficient alternative modes of communication. Numerous courts have ruled that, as a

matter of law, they do.[12] There is no reason to believe courts have had difficulty applying the standard in similar cases, or that courts need further clarification from the Court on this issue.

B. "UNIQUENESS" ALONE DOES NOT PROHIBIT REGULATION OF EXPRESSIVE CONDUCT.

Petitioner argues that the Court should grant certiorari because the Ninth Circuit's decision upheld a regulation that "foreclosed an entire unique medium of expression". However, it is not a ban on an allegedly unique medium of expression that raises First Amendment concerns, it is whether the ban leaves open *adequate* alternative avenues for *expressing the same message. See, Heffron, supra; see, also, City of LaDue v Gilleo,* 512 U.S. 43, 55 (1994).

The "alternative avenue" requirement does not forbid regulations that may effectively prohibit an allegedly unique or unusual means of expressing a message through conduct, but requires only that alternative methods for communicating the message exist. "Alternative" necessarily implies "different", not the same.

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[12] *See, e.g., Kev, Inc. v Kitsap County,* 793 F.2d 1053, 1061 (9th Cir. 1986) ("the ability to engage in the protected expression is not significantly impaired"); *Ino Ino v City of Bellevue,* 132 Wn.2d 103, 130, 937 P.2d 154 (1997) ("allows dancers to engage in all types of movement, with the exception of pure sexual contact, in order to convey eroticism"); *DCR, Inc. v Pierce Cty.,* 92 Wn. App. 660, 679, 964 P.2d 380 (1998) ("dancers may perform the identical dance . . . 10 feet away . . . closer to their audience than many other dancers engaged in artistic performances in theaters and concert halls").

This Court has made it perfectly clear that regulation of the time, place, and manner of expressive conduct is permissible when the *message* can be communicated in other ways. For example, in *Clark, supra,* the Court ruled that a ban on overnight sleeping in certain areas of national parks left open ample alternative channels for communicating the message expressed by certain overnight demonstrations in parks – in that case, bringing attention to the plight of the homeless. *See,* 48 U.S. at 295. The political message could be delivered to the public or the media in other ways – *i.e.,* speech, signs, presence of demonstrators. *Id.,* 468 U.S. at 295.

The fact that symbolic sleeping was a unique and effective means of communicating a particular message did not make the regulation any less constitutional:

> That sleeping, like symbolic tents themselves, may be expressive and part of the message delivered by the demonstration does not make the ban any less a limitation on the *manner* of demonstrating, for reasonable, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid.

468, at 294 (emphasis added).

In *Heffron, supra,* the Court upheld an ordinance requiring a religious organization to distribute literature in an assigned booth at a state fair, rather than allowing members to approach individuals with their pamphlets throughout the fair grounds. While acknowledging that the organization's practice of publicly distributing literature, a religious ritual known as "Sankritin", was a unique and effective mode of communicating religious ideas, this Court ruled that the ordinance passed constitutional muster because it only limited the manner and

location where this ritual took place, and *sufficient* alternative modes of communication still existed. *Id.*, 452 U.S. at 654-5.

For example, members of the organization could mingle with the crowd and "orally propagate their views", they could distribute/sell literature and solicit funds from the designated booth, and they could continue practicing Sankritin anywhere outside the fairgrounds. *See*, 452 U.S. at 654. The touchstone to the Court's decision on this issue was the fact that the ordinance had "not been shown to deny access within the forum in question", as the First Amendment protects the right of every citizen to "reach the minds of willing listeners." *Id.*, 452 U.S. at 655. However, the First Amendment does not guarantee every citizen the right to engage in any type of conduct whenever and wherever they wish simply because they claim to be expressing an idea.

Federal circuit courts have had no difficulty applying this standard when evaluating ordinances that regulate expressive conduct.[13] Even assuming table dancing was considered a unique medium or "subclass" of expression, as Petitioners argue, this Court has specifically stated that a "content-defined subclass" of a proscribed class of speech can be permissibly "swept up incidentally within

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[13] *See, e.g., Carew Reid v Metropolitan Transit Authority*, 903 F.2d 914 (2nd Cir. 1990) (noting that First Amendment does not guarantee access to *every* or the *best* channels or locations for expression, the court upheld a complete ban on use of amplifiers on subway platforms); *Acorn v City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986) (upholding ordinance banning unique and lucrative practice of "tagging" – approaching cars stopped at red lights to distribute pamphlets/solicit contributions – the court stated that plaintiffs had no constitutionally protected right to maintain *that approach* to communication).

the reach of a statute directed at conduct rather than speech". *R.A.V. v City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992). That a subclass of speech is associated with particular "secondary effects" of the speech is a valid basis for according differential treatment to that subclass. *Id.*

Kent's distance requirement does not prohibit erotic dancing – it merely requires that the dance take place at least ten feet from a customer. The ordinance does not preclude dancers from expressing themselves in any manner they wish through dance.

Petitioners argue that dancing performed up close to patrons (termed "table dancing") also sends a "personal" erotic message that makes a customer feel "special" and "important". *See*, Petition, Appendix F. Distance requirements do not prohibit dancers or other individuals from communicating this message either. That "table dancing" may be one unique way of expressing such a message does not give rise to special constitutional protection for such conduct. The message that another person is special or unique can still be communicated in other ways. Dancers are still provided a forum in which they can freely express themselves to the same audience they intended to reach by table dancing. There is nothing unusual about the manner in which the Ninth Circuit applied this standard to the facts in this case that would warrant review by this Court.

CONCLUSION

Based on the foregoing, Respondent requests the Court deny the Petition for Certiorari.

RESPECTFULLY SUBMITTED this 23rd day of July, 1999.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

WILLIAM P. SCHOEL
JAYNE L. FREEMAN
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104
(206) 623-8861

Of Attorneys for Respondent City of Kent, and

CITY OF KENT

ROGER LUBOVICH
City Attorney, City of Kent
220 Fourth Avenue South
Kent, Washington 98032
(253) 856-6770
Of Attorneys for Respondent City of Kent

TABLE OF CONTENTS TO APPENDIX

A AFFIDAVIT OF ROGER LUBOVICH ..... RA 1

B AFFIDAVIT OF J.P. COVEY ..... RA 196

APPENDIX A

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK COLACURCIO, JR., DAVID EBERT, and STEVE FUESTON d/b/a DDF&S INVESTMENT COMPANY, Plaintiffs, v CITY OF KENT, Defendant.	No. C95-1176Z AFFIDAVIT OF ROGER LUBOVICH

STATE OF WASHINGTON)
: ss
County Of King)

ROGER LUBOVICH, being first duly sworn upon oath, deposes and says:

1. I have been the City Attorney for the City of Kent since September 1, 1990. I make this Affidavit based on my own personal knowledge, as well as a review of City of Kent records relevant to adult entertainment issues. This Affidavit is made in support of the City's Motion for Summary Judgment relating to the validity of the City's Adult Entertainment Business Regulation Ordinance No.

3221. There is a significant legislative history to the zoning and business regulation of adult entertainment establishments in the City of Kent, and the purpose of this Affidavit is to outline that history.

2. The City of Kent conducted a comprehensive study of adult entertainment businesses and their secondary impacts and effects on their surrounding community in 1982. The study, attached hereto and incorporated as Ex. A, concluded that adult entertainment establishments cause secondary impacts and effects on the surrounding community including increased crime and the potential for lowered property values. As a result of this study and following the decision of *City of Renton v. Playtime Theater,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the City of Kent, in 1986, adopted a zoning ordinance requiring a thousand foot buffer between adult bookstores and theaters and any residential zone, church, park, school, library or residential or multi-family use. Minutes from the October 28, 1986 Planning Commission meeting regarding that Ordinance are attached hereto and incorporated as Ex. B. That ordinance was amended in 1988 to include a thousand foot buffer for any adult entertainment establishment from such zones or uses.

3. In 1988 the City of Kent City Council passed business regulations regulating standards of conduct within adult entertainment establishments. Ordinance No. 2778, which was passed in May, 1988, was based on the City's 1982 study, as well as a memorandum from then City Attorney Sandra Driscoll and input from former City of Kent Chief of Police Rod Frederickson. A copy of Ms. Driscoll's memorandum and Ordinance No.

2778 are attached hereto and incorporated herein by reference as Ex. C. The Ordinance was codified under Chapter 5.11 of the Kent City Code. Ordinance No. 2778 was an amendment to the City's 1981 Ordinance No. 2312 which prohibited sexual contact in any establishment with a liquor license.

4. In 1994, Plaintiffs herein sued the City of Kent alleging that the City's zoning ordinance relating to adult entertainment establishments was unconstitutional. That case was heard by this Court under Cause No. C94-256Z, and resulted in an Agreed Order on Summary Judgment after both parties brought Motions for Summary Judgment. A copy of the Agreed Order is attached hereto and incorporated herein by reference as Ex. D. Based on your Honor's verbal ruling, the Agreed Order established that the City of Kent had a substantial governmental interest in regulating adult entertainment establishments.

5. The City of Kent has since amended its zoning ordinance in compliance with this Court's Order. During this zoning amendment process the City's Planning Commission held meetings concerning potential amendments to the City's zoning ordinance on February 27, March 27, and April 24, 1995. After public testimony and debate, four different options concerning zoning code amendments were eventually presented to the Kent City Council, which adopted the option providing for the highest number of available sites within the City for adult entertainment establishments.

6. During the Autumn of 1994, I conducted research relating to possible amendments to the City's business regulation ordinance applicable to adult entertainment

establishments. My research included, but was not limited to, researching and reviewing applicable Federal and Washington State case law addressing standards of conduct regulations within adult entertainment establishments, discussing current regulations with municipal officials from several surrounding jurisdictions, and conferences with law enforcement officials. Not only did I discuss potential revisions with law enforcement officials within the City of Kent, I also contacted and met with Detective J.P. Covey of the King County Police Department. I have reviewed the Affidavit of Detective Covey, dated June 12, 1996, and attached to the City of Kent's pending Summary Judgment Motion, and confirmed that Detective Covey and I discussed the matters included in his Affidavit with regard to the regulation of adult entertainment establishments.

7. This research led to my drafting of Ordinance No. 3214 which I presented to the Kent City Council's Operations Committee on February 16, 1995. Transcripts from the February 22, 1995 and April 12, 1995 Operations Committee meetings wherein the above-referenced issues were discussed is attached hereto and incorporated herein as Ex. E. Among other things, this ordinance expanded licensing requirements to adult entertainment businesses other than exotic dance studios which was the only adult entertainment business licensed under prior Ordinance No. 2778. After discussion of the ordinance, the Operations Committee submitted the ordinance to the full City Council with the recommendation that a Public Hearing be held relating to the proposed ordinance. On March 2, 1995, I presented a memorandum to the City Council presenting the proposed ordinance. A copy of my

memorandum is attached hereto and incorporated herein by reference as Ex. F.

8. After Public Hearing on March 7, 1995, the City Council adopted Ordinance No. 3214.

9. Within weeks of the ordinance's adoption, a Trial Court Judge in King County Superior Court rendered a decision relating to adult entertainment establishments which potentially affected Kent's ordinance: *Ino Ino, Inc. v. Bellevue*. Additionally, the Washington Supreme Court rendered its decision in *JJR, Inc. v. City of Seattle*, 126 Wn.2d 1, 891 P.2d 720 (1995). This decision also affected Kent's Ordinance No. 3214. I drafted proposed amendments to the ordinance relating to the use of outdoor signs and the staying of license revocation pending Hearing as well as other amendments. I presented these amendments to the City's Operations Committee and then to the full City Council which, following a hearing, passed Ordinance No. 3221 amending Ordinance No. 3214 and incorporating the recent signage, license revocation and other amendments as recommended.

10. Since at least 1988, the City of Kent has undertaken regulation of adult entertainment establishments and has done so based on thorough study of the issues. Adult entertainment establishments have been regulated by both zoning ordinance and business regulation standards since at least 1988, and these standards were based on thorough City research and a study conducted by the City of Kent in 1982.

FURTHER YOUR AFFIANT sayeth not.

/s/ Roger Lubovich
ROGER LUBOVICH

STATE OF WASHINGTON)
: ss
County of King)

On this 19th day of June, 1996, before me appeared ROGER LUBOVICH to me personally known, and who acknowledged the execution of the foregoing instrument as his free act and deed, for the consideration set forth therein.

/s/ Kimberly Kuhlman
Name:
Notary Public in and for the State of Washington, residing at Kent.
My commission expires 6/29/97.

EXHIBIT A

CONTENTS

Section *Page*

STUDY SUMMARY

I. INTRODUCTION: PURPOSE AND SCOPE OF ADULT USE ZONING STUDY

II. STATE AND LOCAL LAW REGULATING ADULT USES

State Law
Local Law and Zoning Policy

III. ADULT USES IN KENT

IV. THE LAND USE IMPACTS OF ADULT USES

Incidence of Crime
Impacts to Property Values
Land use Incompatibilities

V. MAJOR CASES AND LEGAL GUIDELINES IN ADULT USE LAW

VI. ALTERNATIVE APPROACHES TO ADULT USE ZONING

Dispersion Approaches
Concentration Approaches
Modifies Dispersion /Concentration Approaches
Special Approaches
Evaluation of Alternative Zoning Approaches

VII. ADULT USE ZONING ALTERNATIVES FOR KENT STUDY RECOMMENDATION

Plainng [sic] Objectives and Criteria

Analysis

Zoning Alternatives for Kent

Economic Costs

Study Recommendation

REFERENCES

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Joyce C. Kling, City of Seattle Dept. of Construction

Hank Lewis, City of Edmonds Planning Department

John Mills, John Mills Inc.

Gregory D. Moore, City of Redmond Planning Department

Robert M. Morton, City of Redmond Police Department

Don Muir, Butler-Walls-Darnell, Inc.

Dennis Nixdorf, City of Seattle, Police Department

John Paddock, City of Lynnwood Police Department

Steve Phelan, City of Tukwila Police Department

Phil Webster, Webster Appraisal Inc.

A. D. Wyatt, City of Edmonds Police Department

Introduction: Purpose and Scope of Adult Use Zoning Study[1]

The recent controversy over adult motion picture theaters in other Puget Sound cities[2] has served to remind the City of Kent of its own regulatory provisions related to adult uses. As this study indicates, the land use impacts of adult uses are unique and far-reaching, requiring special regulatory treatment to mitigate adverse

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[1] This study was originally funded by the Kent City Council under the title, "Adult Entertainment District". The name has been changed to the Adult Use Zoning Study since some adult uses are not so much entertainment as they are participatory activities, such as gambling. In addition, the word "district" presupposes that such uses will be concentrated in a single area or district by zoning regulations which would be adopted following the study. This is a decision properly made by the City Council and should not be presumed in the title of the study.

[2] Two cities in the Puget Sound area – Redmond and Renton – have recently been involved in controversies where motion picture theaters, previously oriented to family entertainment, changed to an emphasis on adult films.

impacts. Despite this uniqueness, however, current City zoning regulations do little to differentiate adult uses from general business activities. In addition, existing adult use regulations have been drafted in a piecemeal fashion and do not comprehensively address the special impacts associated with adult uses.

The purpose of the adult use zoning study, as authorized by the Kent City Council, is to determine the effects of adult uses on surrounding businesses, residential neighborhoods, and the community in general. By identifying these effects, the City will be able to better evaluate how to relieve adverse land use impacts through regulatory changes. A secondary objective is to discuss the ability of the City to provide services – primarily protective services – based on alternative locational requirements for adult uses. Finally, alternative zoning approaches for regulating adult uses are discussed in terms of their application to the Kent community.

The scope of this study includes virtually all uses which are restricted to adults only (i.e., persons 18 years old and over). These uses include adult motion picture theaters, adult bookstores, adult motels, gambling establishments, massage parlors,[3] body painting studios, and headshops. Taverns, bars, cocktail lounges, and other places where alcoholic beverages are served are not within the scope of this study inasmuch as these uses do not include a specific adult activity mentioned above.

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[3] Massage parlors are included as an adult use because operators and massagists [sic] are required to be 21 years of age or older by Kent City Code, Section 5.28.16.

To some people, adult entertainment is personally distasteful and disquieting. Attempts to regulate adult uses based purely on these motives, however, have been struck down by the courts. It is not with matters of taste and personal choice that this study is involved but rather the land use impacts associated with adult uses. The City of Kent seeks to assimilate adult uses into the overall urban fabric with the least adverse impact to the business and residential environments.

State and Local Laws Regulating Adult Uses

State Law

While federal and state laws address adult publications, films, and personal conduct, they do not regulate where adult businesses locate. This is a matter to be determined by local government.

State law seeks to protect minors (persons under the age of 18) from sexually explicit films and publicatons. [sic] Under state law, such materials are defined as " . . . being patently offensive, affronting contemporary community standards, appealing to the prurient interests of minors in sex, and are utterly without redeeming social value," (RCW 9.68.050). Such books and films are required to be labelled "Adults Only", barring distribution to minors.

Nude entertainment – such as topless dancing, strip tease, and the like – is permitted by state law although attendance by minors is prohibited. Such activities become violations of the Washington Criminal Code (RCW, Title 9A) if they evolve into acts defined as prostitution, indecent liberties, or public indecency.

Manage [sic] parlors are regulated under state law (RCW 18-108) inasmuch as a state business license is required for the parlor itself and an operators license is required for each of the massagists [sic] employed on the premises. Massage parlors are "adult" uses only insofar as minors are prohibited from working in such activities.

Gambling activities are authorized and regulated under provisions of the Gambling Act of 1973 (RCW 9.46). Essentially, gambling activities are allowed in Washington State only as a stimulant to business and for certain fund-raising purposes. Bingo, social card games, punch boards, pull tabs, and raffles are permitted, under certain conditions, provided such activities are not the dominant aspect of a business being conducted on the premises. State regulations place a host of limitations on gambling activities in order to ensure that such activities remain merely a stimulant to existing business. Minors are prohibited from participating in any gambling activity.

Local Law and Zoning Policy

Under local ordinances, certain adults uses are regulated by a disjointed collection of licensing requirements, zoning controls, and general public welfare provisions. No comprehensive set of regulations addresses all types of adult uses, and regulations relating to the location of such uses are conspicuously lacking.

As a starting point, city zoning policies do not differentiate adult uses from other similar business establishments and activities. For example, an adult bookstore is simply a bookstore as far as existing zoning regulations are concerned, and it is permitted to be located in any zone

which allows general bookstores. This same policy applies to other adult uses. As a result, adult uses may be located in the following use districts according to existing zoning provisions:

Type of Adult Use	Zone Permitted*
Motion picture theater (adult)	GC, HC, DC
Bookstore (Adult)	GC, HC, DC
Body painting studio	GC, DC
Massage parlor	GC, DC
Novelty shops (sex related)	GC, DC
Gambling (e.g., bingo)	GC, HC, DC

*Note: GC – General Commercial
HC – Highway Commercial
DC – Downtown Commercial

Since the abovementioned commercial zones are dispersed throughout the City of Kent, the pattern of permissible locations for adult uses under current zoning regulations is consequently dispersed. HC (Highway Commercial) zoning is found primarily along Highway 99 and the East Valley Highway north of downtown Kent. GC (General Commercial) zoning is found along Highway 99 and on the east and west sides of the downtown area. DC (Downtown Commercial) zoning is concentrated in the central business district of downtown Kent. It should be noted that no HC, GC, or DC zoning presently occurs in the East Hill area.

Gambling activities are somewhat unique when it comes to zoning regulations. That is, state law permits certain

gambling activities such as bingo, punch boards, and pull tabs to be conducted by clubs, churches, and charitable organizations. Of course, state regulations require that such gambling activities be only an accessory or secondary part of said club, church, or organization. However, the net effect is that these gambling activities may be located in nonbusiness zones of the city. In fact, some permissible locations are located in the middle of well-established residential areas.

The Kent City Code maintains special licensing requirements and procedures for massage parlors (KCC 5.28) and model or body painting studios (KCC 5.26). The purpose of such license requirements is to define proper employee and customer conduct, ensure qualified and legitimate service to the public, and outline special operating provisions relative to such uses. No special zoning or locational requirements are imposed as a part of the licensing procedure.

A couple of recent City of Kent ordinances aimed at the general public welfare are worthy of note here. Ordinance 2312, passed in September 1981, addresses the conduct of persons (adults) on premises licensed under the authority of the Washington State Liquor Control Board. This ordinance prohibits topless dancing and other similar acts in places where alcoholic beverages are served.

Ordinance 2242, adopted in August 1980, deals with the sale and display of drug paraphernalia. This ordinance prohibits minors from entering business establishments which sell and/or display devices which are designed or intended to be used for illegal consumption of drugs.

ADULT USES IN KENT

Gambling activities comprise the primary type of adult use currently found in the City of Kent. Besides gambling, the only other adult uses are an adult motel and a "headshop". At the present time, no adult bookstore, adult theater, massage parlor, or body painting studio is operating within Kent City limits.

Eighteen establishments – 10 taverns, 4 social clubs, 2 restaurants, a church and a bowling alley – currently conduct bingo, social card games, punch board and pull tab gambling activities. Pull tabs are the most prevalent form of gambling, being offered in 16 of 18 establishments. Bingo is conducted in 5 establishments while social card games are offered in only one location. Punch boards are available in three establishments.

As shown on Map 1, 12 of the 18 estblishments [sic] where gambling is conducted are located in or near the downtown area of Kent. Of these establishments, 11 are businesses where punch boards and pull tabs are used as a business stimulant.

Gambling is conducted at two locations in the East Hill area of Kent. In addition, two sites on West Hill offer gambling activities; both are located along Pacific Highway South.

An adult motel (a motel where adult films may be shown in individual rooms) is located in the commercial strip along Meeker Street west of the downtown area. This use has been in operation for many years as a motel but has operated as an adult motel for only the past couple of

years. Also, a "headstop" (a business where drug paraphernalia is sold or displayed) is located in the Benson Center shopping area on East Hill. Under local ordinance, minors are prohibited from entering such an establishment without the company of a parent or guardian.

Within the past year, two adult uses have been closed by the City due to violations of their business license and/or criminal activity which has occurred on the premises. Until September 1981, topless dancing was offered at the Roadside Inn Tavern on Meeker Street west of the downtown area. Acts of prostitution and narcotics violations which occurred at the Roadside eventually led to its being closed by the Kent Police Department. An ordinance passed by the City Council late last year then banned any kind of nudity at establishments licensed by the Washington State Liquor Control Board. A second adult use was closed by the City last year due to alleged violations of its business license. The case involves a former massage parlor on Pacific Highway South which has since moved to a location outside the City. (The following section of this report further details the history of these adult uses and discusses their impacts on surrounding residential and business environments.)

The Land Use Impacts of Adult Uses

In order to better plan for the regulation and location of adult uses, it is necessary to understand their special impacts. And adult uses do have special impacts, as the following discussion will clarify. Although much of the data and experience with adult uses is taken from other jurisdictions, many of them from within Puget Sound

region, their implications for planning in the City of Kent are both relevant and illuminating.

Incidence of Crime

Between 1969 and 1972, Detroit's number of adult theaters increased from 2 to 18 and the number of adult bookstores rose from 2 to 21. During the same period, the incidence of crime in and around these establishments increased dramatically, although hard data on the actual numbers is hidden in gross criminal statistics. The high incidence of crime together with the blighting or skid-row effect of proliferating adult businesses led Detroit in 1972 to adopt stringent locational regulations for adult uses.

Similar to Detroit, the City of Cleveland experienced a rapid increase of adult uses during the early 1970's. Unlike Detroit, Cleveland kept detailed crime statistics by census tract and by location of adult businesses. In 1976, Cleveland had 204 census tracts and 26 adult businesses (8 theaters and 18 bookstores). The same year, the two census tracts having the highest rates of crime had a total of 8 pornography outlets. Cleveland Police statistics showed that during 1976 there was an average of 20.5 robberies per census tract. In the 15 census tracts which contained adult businesses, the average was nearly double at 40.5 robberies. A single census tract which contained 5 pornography outlets and a population of only 730 persons had a total of 136 robberies. The statistics for rape echoed the same pattern as for robbery.

The city-wide average of rape crime in Cleveland in 1976 was 2.4 per census tract. In the 15 census tracts containing pornography outlets, the rate was double for the city-wide average. Furthermore, for four census tracts which contained a total of 10 adult uses, the average rate for rapes was 8.8 per tract, neatly four times the average for the city. The crime statistics compiled by the Police Department's Data Processing unit led the Department to state: "The facts that were obtained verified what knowledgeable police officers had always been aware of, and that is the incidence of crime is much greater in areas where smut outlets are located."[4]

Although hard crime statistics were not submitted, many of the respondents to the Planning Department's questionnaire stated that they felt the incidence of crime was related to the presence of adult businesses in their communities. Kent's own experience with the Roadside Inn Tavern serves to point this out, although it does not by itself prove that crime and adult uses are necessarily directly related. Prior to its forced closing, the Roadside Inn offered topless dancing and table dancing in conjunction with its selling of alcoholic beverages. Kent police investigations conducted in the summer of 1981 revealed a very high incidence of criminal activity at the Roadside, related primarily to sex crimes (prostitution) and drug related offenses. As a result of 57 hours of on-premise investigation, 162 charges were brought against 21 persons by the Kent Police Department. The report filed by the police stated: "The total time involved, and the

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[4] City of Cleveland Police Department memo, August 24, 1977.

number of charges, break down to a time expenditure of slightly more than 20 minutes per charge, attesting to the relative case by which the subject of prostitution arises within an environment such as the Roadside."[5] In September 1981, the Roadside Inn Tavern was closed by the City.

Although crime statistics and police records seem to point to a connection between adult (primarily pornographic) uses and illicit behavior, psychological and behavioral studies attempting to link the two are more guarded. In 1970, the Presidential Commission on Obscenity and Pornography issued its final report which found " . . . no evidence . . . that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults."[6] Ever since the publication of the Commission's report in 1970, behavioral scientists have attempted to refute its conclusion, especially with reference to the relationship between violent pornography and aggressive (or criminal) behavior.

Some recent studies by psychologists and social scientists[7] indicate that under certain conditions, exposure to

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[5] City of Kent Police Department memo, August 13, 1981.

[6] *Presidential Commission on Obscenity and Pornography*, New York (1970), p. 32.

[7] SEE, for example; S. Feshbach and N. Malamuth, "Sex and Aggression: Proving the Link," *Psychology Today* (1978); E. Donnerstein, "Pornography and Violence Against Women," *Annals of the New York Academy of Science* (1979); Y. Jaffe, et al., "Sexual Arousal and Behavioral Aggression," *Journal of Personality and Social Psychology* (1974); T. P. Meyer, "The Effects

aggressive-erotic films and books can facilitate aggressive behavior, usually by men against women. The theory put forward by these studies is that sadomasochistic sex presented through the media may erode the inhibitions of the male viewer which normally supress aggressive sexual (criminal) behavior. Watching an aggressive-erotic film, in other words, somehow makes the act of rape appear less immoral or injurious. Nevertheless, it is not the point of this report to prove that there is a link between sexual media and deviant or criminal behavior; the scientific community is obviously split on this issue as well as on the degree to which this relationship may or may not be true.

The fact is, however, many prominent psychologists and social scientists believe there *is* a relationship and have conducted experiments in order to demonstrate it. In addition, the assertion that aggressive-erotica may spur criminal behavior appears to be getting more plausible, if not less debatable. In any case, we find the criminal data developed by various police agencies together with the scientific literature developed around the issue of aggressive-erotica and violence to be compelling reasons for differentiating between adult uses and other business activities insofar as regulatory treatment is concerned.

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of Sexually Arousing and Violent Films on Aggressive Behavior," *Journal of Sex Research* (1972); and, P. H. Tannenbaum and D. Zillmann, "Emotional Arousal in the Facilitation of Aggression Through Communication," *Advances in Experimental Social Psychology* Vol. 8 (1975).

Impacts to Property Values

A spin-off effect of providing compatibility between urban land uses is the preservation and enhancement of property values. This effect is often cited as a major objective or purpose of zoning. Nevertheless, a decline in property values is sometimes unavoidable, as in the case where there is a lack of market demand, a shift in locational preferences, or a downturn in general economic conditions. These unavoidable circumstances cannot be mitigated through zoning. On the other hand, certain negative influences which bear on property value, such as land use incompatibility, can be dealt with through zoning regulations. For example, urban zoning generally seeks to avoid placing noisy, heavy industrial uses in the same area with residential uses. Among other impacts, industrial uses tend to have an adverse effect on the value of residential property. The severity of the adverse effect varies with the intensity of use and specific locational and developmental characteristics.

In a similar vein, adult uses are incompatible with certain other land uses and, if juxtaposed, a reduction in property values may be a predictable result in certain cases. This expectation was borne out in a recent telephone survey of real estate appraisers conducted by the Kent Planning Department.[8]

In the Department's survey, all appraisers cautioned that each case must be evaluated individually and according to its particular circumstances. Nevertheless, the majority of appraisers agreed that the impact of adult uses on

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[8] Kent Planning Department files, August 1982.

residential property values is probably negative although no general rule can be applied. One appraiser estimated that the adverse effect could be as much as one to three percent of the property's total value. The total effect on property value depended on several factors including proximity to the adult use, exterior building appearance and condition of the adult business, neighborhood characteristics, among other factors.

There was also a concensus among appraisers on the effects of adult uses on commercial properties. As a general rule, most appraisers felt that in cases where an adult use located in a commercial environment, little or no adverse impact would be expected either to surrounding businesses or property values. No appraiser surveyed expected that the impact on property values would be detrimental while one ventured that in a depressed commercial area the impact could potentially be favorable.

Land Use Incompatibilities

Nationwide, the proliferation of adult uses has occurred primarily within the last 10-15 years; in the Puget Sound area, the trend has been even more recent. As a result, comprehensive studies dealing with the compatibility of adult uses with other specific land uses are nonexistent. The reports and studies which have been prepared are essentially confined to the industrial experiences of a myriad communites [sic] where adult uses have sprouted.

From the experience of Puget Sound communities researched by the Kent Planning Department, it can be stated that adult uses are incompatible with residential, educational, and religious uses, individually as well as

collectively. This fact was demonstrated in the Greenwood area of Seattle in the mid-1970's when a local theater began showing x-rated films. Residents of Greenwood complained loudly about increased traffic, undesirable patrons, lowered property values and other adverse impacts. Residents argued that theirs was an area of residences, churches, schools, and social gathering places, a closely-knit neighborhood unaccustomed to adult theaters and the disruptive impacts associated with such uses. In order to safeguard the character and quality of residential life in the Greenwood neighborhood, the City of Seattle adopted zoning regulations which, in effect, forced the closure of the adult theater. The owner then sued the city. In the litigation which ensued, Seattle was able to demonstrate in the record that the location of the adult theater in the Greenwood area had a harmful effect on that area and contributed to neighborhood blight. In upholding the City of Seattle, the Washington State Supreme Court agreed that the goal of preserving the quality of residential neighborhoods by prohibiting disruptive [sic] adult uses was a valid and substantial public interest.[9]

The City of Kent itself has had a recent experience with complaints of residents over an adult use. The incident involved the Roadside Inn Tavern – a tavern which offered topless dancing and table dancing – and the residents of an adjacent mobile home court. In July 1981, the

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[9] *Northend Cinema v. City of Seattle*, 90 Wn 2d 709, 585 P.2d 1153 (1978)

residents of Bonel Mobile Home Court submitted a petition requesting the Kent City Council to revoke the business license of the Roadside. At the public hearing on the license revocation, residents complained about the Roadside's excessive noise and litter impacts which spilled over onto adjacent residential properties. As a result of public complaints and a city police investigation of criminal activity at the tavern, the license for the Roadside was revoked by the City Council in September 1981.

Adult uses, especially pornographic establishments, have often been cited as incompatible with educational and religious uses. This was the case in the Greenwood example mentioned above. Seattle city planners maintained that the proximity of an adult theater to schools and churches was disruptive to the residential community. In addition, the exposure or visibility of the adult theater to school-age children in the Greenwood area was viewed as detrimental to the quality of residential life. Residents of the area testified to the adverse effect of such a use on the family orientation of the neighborhood. These findings were made part of the court's record in the Greenwood case and helped form a basis for its decision in favor of the city.

Gambling activities, authorized in Washington State only since 1973, have received little attention insofar as land use planning studies are concerned. With little research having been done in this area, the Kent Planning Department broke new ground by distributing a questionnaire and interviewing police and planning personnel from other communities. The results of the Department's inquiry appear to indicate that gambling activities do not

cause any special or undue land use impacts to neighboring uses above and beyond those normally associated with business enterprises. No one responding to the adult use questionnaire indicated that gambling caused any special land use compatibility problems for neighboring uses. During interviews, respondents revealed that gambling establishments were the source of very few complaints; the complaints which were received emanated not from the general public or abutting properties but from the gambling participants themselves.

Major Cases and Legal Guidelines in Adult Use Law

Municipalities have been turning to zoning laws as a means of controlling the spread of adult establishments ever since the 1976 U.S. Supreme Court decision of *Young v. American Mini Theaters* 427 U.S. 50, 96 S.Ct. 2440 (1976). In this landmark case, the zoning regulations of the City of Detroit, Michigan, which prohibited specified adult uses from locating within 1,000 feet of one another, were upheld as a constitutionally valid exercise of the City's police power. Since the *Young* case, countless jurisdictions across the country have followed Detroit's lead, utilizing zoning regulations to control the location of adult businesses.

Many of the new adult use zoning regulations have been challenged in the courts and not all have enjoyed the same success as Detroit. Case law since *Young* demonstrates one very important point: regulations must be carefully drafted. Regulation of adult uses, especially with regard to theaters and bookstores which are protected under the First Amendment, walks a thin line

between valid land use control and unconstitutional restraint of free speech. While each case is unique, the courts appear to follow four general rules or guidelines in deciding adult use zoning cases.[10] These guidelines are discussed below in conjunction with some of the major cases:

1. Adult use zoning regulations must not be drawn so tight as to prohibit or severely restrict the location of adult businesses.

In the *Young* case mentioned earlier, the U.S. Supreme Court maintained that pornography zoning is constitutional only so long as the "market for this commodity (adult entertainment) is essentially unrestrained." In other words, locational requirements imposed by zoning ordinances must ensure available sites for adult businesses. Detroit's regulations were upheld partly because they provided a sufficient number of available sites for existing and potential adult businesses. The 1,000 foot anti-clustering provision in Detroit ordinance did not, in the opinion of the court, "significantly reduce public access to sexually oriented businesses."

Although similar to the Detroit ordinance, adult use regulations in Atlanta, Georgia did not stand up under challenge in *Purple Onion, Inc. v. Jackson* 511 F. Supp. 1207

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[10] Much of the information discussed under these four guidelines is taken from Alan Weinstein, "Regulating Pornography: Recent Legal Trends," *Land Use Law,* February 1982; Also, SEE, Frederic A. Strom, *Zoning Control of Sex Businesses* New York, 1977.

(N.D. Georgia 1981). Enacted in 1976, Atlanta's regulations permitted adult uses in certain zone districts but only as long as they conformed to specific distance requirements from churches, residences, and other adult uses. Based on an analysis of site availability, the court found that only 10 sites in the whole of Atlanta were suitable for adult businesses. At the time of trial, 43 sexually oriented businesses were located in the city. The court invalidated Atlanta's ordinance, finding that it unconstitutionally suppressed the public's access to sexually oriented businesses.

In a similar case, *CLR Corp. v. Henline*, 520 F. Supp. 760 (W.D. Michigan 1981), the adult use regulations of Wyoming, Michigan, a city of 62,000 located adjacent to Grand Rapids, were struck down when the court found that they unreasonably restricted the location of adult businesses. During trial, it was revealed that the effect of the distance and zoning requirements rendered only two to four sites in the entire city available for adult businesses. Regulations of Cook County, Illinois, were also found too restraining in *County of Cook v. World Wide News Agency*, 424 N.E. 2d 1173 (1981), but with a different twist. The Cook County ordinance limited adult businesses to a single zone district, required them to obtain a special use permit, and contained distance provisions designed to protect residential areas. The court found the cumulative effect of these regulations to be overly restrictive.

2. The basis for adult use zoning ordinances should be a factual record which relates such restrictions to recognized zoning purposes.

The *Young* case established very early that adult use regulations must be directed toward protecting the health, safety, and general welfare of the public in order to be sustained. In this case, the City of Detroit was able to convince the court through studies and the testimony of experts that its anti-clustering requirements prevented a skid-row effect and, hence, achieved a valid public purpose. The City of Seattle was also able to demonstrate that its regulations were related to valid zoning purposes in *Northend Cinema, Inc. v. City of Seattle*, 90 Wn.2d 709, 585 P.2d 1153 (1978). In this case, an adult theater began operations in the Greenwood area of Seattle, a residential community oriented to families. Based on input from residents and statements by experts as to the incompatibility of adult theaters in residential environments, Seattle adopted regulations which restricted adult theaters to the downtown area of the City, far removed from family-oriented neighborhoods. In upholding the City of Seattle, the Washington State Supreme Court found a direct relationship between the adult theater regulations and the protection of the quality of residential life, a valid purpose of zoning.

The City of Wyoming, Michigan, was not as fortunate as Seattle in the *Henline* case, cited earlier. In overturning Wyoming's pornography zoning ordinance, the court found that the city had failed to conduct any background studies of adult uses and their land use impacts. It was not enough, in the opinion of the court, to rely entirely on the legislative history of other cities.

3. Zoning ordinances should not grant broad discretionary powers to public officials to determine whether or not adult uses will be permitted.

The courts will generally permit public officials to exercise discretionary powers relative to adult businesses only under limited circumstances. Discretion may be used to close or prohibit an adult use in cases where the authority to do so stems from an ordinance were [sic] such uses are not singled out for special, oftentimes discriminatory, treatment. Also, discretion may be used where strict limits on administrative authority and procedures work to safeguard First Amendment rights.

In *Chulchian v. City of Indianapolis*, 633 F.2d 27 (1980), the City's revocation of a business license for an adult theater was upheld by the court. In court, the City of Indianapolis showed that the business license ordinance applied to all businesses, not just adult uses, and that the purpose of revocation was not directed at the content of the motion pictures. Finding that a high incidence of crime took place on the premises and that neighboring residents considered the theater to be a nuisance, the court found the decision to close the theater a valid exercise of administrative authority.

Licensing procedures of Westmont, Illinois were thrown out by the court in *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497 (1980). Westmont had established a three-member board whose purpose was to review motion pictures being shown in the community to determine whether or not they were obscene. If the board found a movie to be obscene, the theater's business license could be suspended. Further violations by the

same theater could lead to a revocation of its business license. The court found the licensing ordinance insufficient in failing to provide adequate procedural protections of speech. The court found the "unbridled discretion" delegated to public officials a particularly objectionable part of the licensing procedures.

In *Genusa v. City of Peoria*, 619 F.2d 1203 (1980), the court also frowned on special inspection requirements for adult businesses. According to Peoria's business license ordinance, adult uses were singled out for a special inspection to determine city code compliance. To the court, this "selective enforcement" was an unconstitutional requirement which discriminated against uses distinguished by the content of the books or movies sold on the premises.

4. Ordinances must be clear in their language, especially in their definitions, making it easy to determine what is and what is not regulated.

Court challenges to adult use zoning regulations have consistently attached ordinance wording and definitions on the grounds of unconstitutional vagueness. In the eyes of the court, vaguely drawn ordinances, especially definitions, act as a prior restraint on free speech and are commonly invalidated. This is especially true with regard to adult theaters and bookstores which are protected by the First Amendment.

Purple Onion, Inc. v. Jackson, supra, serves as one of the most blatant cases involving a challenge to unconstitutional vagueness. In this case, the court found that Atlanta's definition of an "adult book store" could include any dwelling unit where adult publications were

displayed. It also found that the Atlanta Civic Center could be defined, under the city's ordinance, as an adult entertainment establishment since, on occasion, the Center offered entertainment regulated by the ordinance. Broad, sweeping definitions were part of the reason for the court's invalidation of the Atlanta ordinance.

Nearly all of cases mentioned previously in this section have also involved a challenge on the grounds of unconstitutional vagueness. In *Entertainment Concepts, Inc. v. Maciejewski*, supra, Westmont's ordinance was found to contain no definition of the term "adult movie," the precise use it was intended to regulate. Plaintiffs attacked the Indianapolis ordinance on grounds of not properly defining the word "permit" in *Chulchian v. City of Indianapolis*, supra. In both *CLR Corp. v. Henline*, supra, and *Genusa v. City of Peoria*, supra, the definition of "adult book store" was challenged as unconstitutionally vague. In *Northend Cinema, Inc. v. City of Seattle*, supra, Seattle's ordinance was attacked on the grounds that an "adult theater" was not properly defined, thus denying due process. Even in the landmark case of *Young v. American Mini Theaters*, supra, plaintiffs contested the definitions and procedures of the Detroit adult use zoning ordinance. Detroit's language ultimately held up in court, and since, many other cities have copied its definitions as well as its procedures and regulations. Of the cases cited in this analysis, only *County of Cook v. World Wide News Agency*, supra, did not involve a challenge to ordinance vagueness. Nor did it need to, for the ordinance was invalidated by the Illinois Appellate Court on a number of other grounds.

Additional Comments

Before going on to alternative zoning approaches for regulating adult uses, one additional point is worth noting. Adult motion picture theaters and adult bookstores enjoy protection under the First Amendment (free speech). As such, zoning regulations must be carefully drawn so as to not restrain the market for such activities. Gambling, massage parlors, and other adult uses are generally not protected under the First Amendment and regulations may be more direct and restrictive.

Any effort by the City of Kent to regulate adult uses is aided by the courtroom experience of other cities' ordinances. These cases help us to understand how the courts view such regulations and what specific concerns opponents have. Nationwide, many different zoning approaches have been developed for regulating adult uses, as the following chapter will show. Ultimately, Kent may choose to adopt a zoning scheme similar to one used by other communities, or it may choose to develop its own unique approach. In either case, the legal guidelines discussed in this section will be helpful in drafting these regulations.

Alternative Approaches to Adult Use Zoning

Because zoning regulations are an expression of local public policy, they differ widely from one community to another. This is certainly true for adult use zoning ordinances which have been adopted in the past 10-15 years. Some communities have followed Detroit's lead and require adult uses to disperse throughout the commercial

areas of the city. Other communities have chosen different paths. Boston, for example, concentrates adult businesses in a seven-acre zoning district located in the commercial core. Seattle follows a similar scheme of concentrating adult uses but allows them in a much larger area of downtown. Norwalk, California designates certain adult uses as conditional uses and requires them to obtain a conditional use permit. At this time, the City of Redmond, Washington is considering an approach somewhere between that of Detroit and Boston which allows adult uses in designated commercial zones as long as specific distance requirements are maintained.

The nature of adult use zoning regulations is inextricably related to a city's unique local circumstances. As the above examples demonstrate, there is no standard or magic zoning formula which can be applied to all communities. Regulations reflect local development policy, existing development patterns, local zoning practice, and methods of impact mitigation. But while the specific requirements of adult use zoning ordinances vary greatly, there appear to be four generalized approaches to land use regulations which are in common use:

1. Dispersion ordinances;
2. Concentration ordinances;
3. Modified dispersion/concentration ordinances; and
4. Special ordinances (includes licensing approaches).

These approaches are discussed individually below in conjunction with specific examples from cities and counties.

Dispersion Approaches

Dispersion-type ordinances seek to spread adult uses throughout a city as opposed to concentrating on them. Regulations commonly require that adult uses locate in designated commercial or industrial zone districts which [sic] maintaining specified minimum distances from schools, churches, and residences. In addition, dispersion ordinances (also call [sic] "anti-clustering" ordinances) usually require that adult uses maintain certain distances between themselves.

Perhaps the best known example of a dispersal approach is the City of Detroit ordinance mentioned earlier in this study. Detroit's regulations prohibit adult uses from locating within 500 feet of a residential zone, and require that a minimum distance of 1,000 feet be maintained between any two adult uses. The result of these restrictions is a dispersed pattern of location.

In Detroit's case, the purpose of dispersing adult uses was to prevent a "skid-row" effect in the commercial areas of the city. Detroit planners had noticed that concentrations of certain adult uses often resulted in decreased property value and urban blight, higher crime rates, traffic congestion, and depressed neighborhood conditions.[11] The city's zoning restrictions which required dispersion of such uses were aimed at alleviating this skid-row effect. A dispersion policy also protects

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[11] William Toner, *Regulating Sex Businesses*. American Society of Planning Officials, Planning Advisory Report No. 327, (1977), p.2.

residential areas by zoning to maintain their social and recreational integrity.

Our research of Puget Sound jurisdictions did not uncover any "pure" example of a dispersion type ordinance presently in use. Most cities in this region utilize either a concentration or modified dispersion approach. Both of these approaches are discussed below.

Concentration Approaches

The concentration approach seeks to cluster or concentrate adult uses in certain areas, the opposite effect of dispersion approach. The most common way to concentrate adult uses is by restricting them to a certain zone or district of the city.

Boston's "adult entertainment zone" is the most prominent example of a concentration approach. Boston zoning regulations restrict adult uses to a special "overlay" district that applies to only seven acres of the city.[12] Called the "combat zone," this is the only area in the city where adult bookstores and theaters, peep shows, and strip joints may locate. The ordinance simply defines certain adult uses and adds them to the list of permitted uses in a specific part of downtown Boston.

Concentration of adult uses seek to confine the impacts of such uses to a small area. In effect, this prevents the spread of adult uses to other parts of the city. This approach is especially effective, at least in larger cities, in keeping adult uses from encroaching on residential areas.

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[12] Toner, p. 7.

It also has advantages for law enforcement since patrols can be more efficient and effective, although it is debatable whether this approach has any different impact on the incidence of crime than a dispersion policy.

Locally, Seattle's ordinance is a good example of a concentration policy. According to Seattle's regulations, adult theaters are restricted to two commercial zoning districts located only in the downtown core area. Seattle adopted its regulations in order to protect its residential neighborhoods from the adverse impacts associated with adult movie theaters. The City of Lynnwood also maintains a concentration type ordinance. There, adult entertainment establishments are confined to a single zoning-district, called the "metropolitan commercial" zone, which is designated on the city's zoning map. Lynnwood implemented a concentration policy in order to preserve its residential neighborhoods, as Seattle did, but also to protect the community's business activities which were "sensitive" to the adverse effects commonly associated with adult uses.

Modified Dispersion/Concentration Approaches

In many instances, the regulatory approach of a local government is neither purely a dispersion nor a concentration policy. Regulations often times are borrowed from both types of approaches.

Again, it should be stated that each municipality is unique and regulations that work in one community may not be appropriate or effective in another. In order to reduce adverse impacts which [sic] assimilating adult

uses, it may be necessary to use a combination of regulations. The courts have allowed a variety of regulatory approaches for adult use zoning as long as the purposes of such regulations are valid.

The City of Renton employs a modified dispersion approach for adult theaters. Renton's ordinance allows adult motion picture theaters in certain commercial zoning districts as long as minimum distances are maintained from schools, churches, residences, and public parks. The ordinance both concentrates adult theaters in certain zones and disperses them away from residences and social and educational institutions. It is not a pure dispersion ordinance, however, since it does not require a minimum distance between like uses. The City of Tukwila's zoning regulations for adult theaters are a virtual mirror image of Renton's.

As of August 1982, the City of Redmond was considering a modified dispersion approach for all adult entertainment establishments. Under the proposed regulations, adult uses would be permitted in certain commercial districts while maintain [sic] minimum distances from religious, educational, and residential uses.

Special Approaches

A number of regulatory approaches do not fall neatly under either of the approaches previously mentioned. Some of these "special" approaches still involve zoning, however, while others deal with licensing procedures and regulations.

An example of a special type of zoning approach is that of Norwalk, California. The Norwalk ordinance classifies adult bookstores as conditional uses, subject to the terms and procedures of a conditional use permit. Such uses may locate only in certain zones, they must conform to development standards and criteria specified in the ordinance, and they must undergo a special review and approval process by the planning commission and City Council. Norwalk's development standards which adult bookstores must conform to are aimed at mitigating the adverse impacts of such use.[13]

Licensing of businesses or operators is a very common method of controlling or regulating the location of adult businesses. Most licensing ordinances relate only to such adult uses as massage parlors, strip joints, peep shows, and the like where the activity is not necessarily protected under the First Amendment and where local officials may exercise greater discretion in their decision making. Adult theaters and adult bookstores, whose content is protected under the First Amendment, generally are not included in adult use licensing ordinances. In

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[13] A similar approach to Norwalk was that of the City of Westmont, Illinois, mentioned earlier in this report in connection with the court case *Entertainment Concept, Inc. v. Maciejewski*, Westmont's ordinance designated adult theaters as "special uses", requiring a special use permit from the city council. The ordinance's lack of adequate standards and criteria, however, led to its invalidation by the courts. Such special types of zoning must be carefully drawn, making sure to clarify the governmental interests being advanced, to give adequate criteria for decision making, and to safeguard the rights of operators under the First Amendment.

ordinances where they do appear, regulations and procedures must be sensitive to the constitutional issues associated with the control of speech.

In a typical licensing approach, an adult business is permitted within certain zoning districts only after a license to operate is issued. The issuance of the license is generally contingent upon an applicant's successful conformance to stipulated procedures of the ordinance. A license may be denied by the reviewing agency if it is left with an unfavorable impression of the proposed operation and its anticipated effects on the community. Typically, the location of the adult use is not regulated by the license ordinance but by zoning policy.

The City of Kent's massage parlor ordinance (KCC 5.28) is a representative example of a licensing approach to adult use regulation. While the ordinance does not regulate where massage parlors may locate (city zoning allows them in specific zoning districts), it does stipulate a number of procedures which applicants for such a use must conform to in order to operate. These procedures require extensive information on the applicants and employees, specify facility standards and operational conditions for the establishment, and stipulate special license fees. Kent also regulates and licenses body painting studios under procedures similar to those for massage parlors. Licenses for both massage parlors and body painting studios may be denied by the city if the applicant fails to comply with any of the requirements of the license ordinance. Under Kent's ordinances, a license for any business (including adult uses) can be revoked, once issued, if such activity becomes a public nuisance, as

defined in KCC 9.04.08, or operates in violation of the provisions of KCC 5.02.42.

Evaluation of Alternative Zoning Approaches

Generally speaking, the primary purpose of a dispersion zoning policy is to prevent a skid-row effect in commercial areas of a community. By requiring minimum distances between adult uses, their adverse impacts are diluted by surrounding business activities. Dispersion theoretically avoids the cumulative impacts of declining property values and urban blight. On the other hand, dispersion approaches run the risk of spreading out the adverse impacts of adult businesses over a wider area. To mitigate this effect, many communities modify the dispersion approach by adding minimum distance requirements between adult uses and residential zones, churches, and schools. This modified dispersion policy has the advantage of protecting residential and other uses from the incompatibilities caused by adult uses.

A common disadvantage of these modified approaches lies in their administration and enforcement. If not carefully drafted, the net effect of minimum distance requirements may be to eliminate suitable adult use sites, a result not favored by the courts.

On the other hand, a concentration approach has the advantage of confining the adverse impacts of adult businesses to a predetermined, designated area. Usually the chosen district or zone where adult uses are permitted is located far from residential neighborhoods; hence, residences may receive the greatest protection from the adverse impacts of adult uses under this type of

approach. However, by concentrating adult uses in a certain part of the City, the adverse impacts of each use may contribute to an overall or cumulative adverse impact to the adult use district. Possible cumulative effects could include decreased property values, increased criminal activity, and urban blight.

VII

Adult Use Zoning Alternatives for Kent Study Recommendation

The form of this chapter follows a very straight forward, traditional planning approach. The first step in the process involves establishing planning objectives and criteria for the zoning regulation of adult uses. Following an analysis of the application of these criteria to the City of Kent, alternative zoning approaches are described. These alternatives are briefly evaluated for their anticipated advantages and disadvantages and, based on this evaluation, a staff recommendation (preferred alternative) is made.

The staff recommendation (and, hence, the recommendation of this study) deals only with a general approach to adult use zoning; it does not specify exact zoning standards nor impose any new zoning classifications should the city council decide to endorse the staff recommendation, a program would have to be initiated by the Planning Department to develop specific zoning regulations in order to actually implement the preferred regulatory approach. These proposed regulations, then, would have

to be reviewed by the planning commission for a recommendation before being finally adopted by the City Council.

Planning Objectives and Criteria

Zoning regulations of adult business should accomplish the following land use objectives:

Overall planning objective – To provide, through adequate zoning regulations, suitable sites or locations for adult uses which reduce or eliminate the adverse land impacts associated with such uses.

Planning objective 1 – Protect residential neighborhoods, particularly those which are family-oriented, from incompatible adult uses.

Planning objective 2 – Protect the religious environment of the community from incompatible adult uses.

Planning objective 3 – Protect the integrity of public places such as parks, which are primarily used by or oriented to minors from incompatible adult uses.

Planning objective 4 – Protect the community's educational environment, particularly schools oriented to minors, from incompatible adult uses.

Planning objective 5 – Protect commercial areas from the urban blighting effects of clustered adult uses.

In order to accomplish the above stated objectives, the following criteria could apply (the order of criteria corresponds to the order of objectives, above:

Criteria 1 – Prohibit the location of adult uses within a specified minium [sic]

distance of residential zone districts. (One thousand feet is a commonly used standard.)

Criteria 2 – Prohibit the location of adult uses within a specified minimum distance of churches. (One thousand feet is commonly used standard.)

Criteria 3 – Prohibit the location of adult uses within a specified minimum distance of public parks and playgrounds which are oriented to use by children. (One thousand feet is a commonly used standard.)

Criteria 4 – Prohibit the location of adult uses within a specified minimum distance of public and private elementary and secondary schools. (One thousand feet is a commonly used standard.)

Criteria 5 – Require a minimum distance to be maintained between two or more adult uses in areas where such uses are permitted. (Five hundred feet is a commonly used standard.)

Analysis

Maps 2-5 illustrate the application of the criteria outlines above. Map 2 depicts areas of the city which are located within 1000 feet of residential zone districts. Map 3 areas [sic] within 1000 feet of churches. Map 4 shows areas within 1000 feet of public parks and playgrounds; and, Map 5 shows areas within 1000 feet of schools.

Map 6 is a composite map consisting of an overlaying of Map 2-5. Therefore, areas which are darkened or shaded

on Map 6 represent areas within 1000 feet of either a residential zone district, church, public park, or school. For purposes of this discussion, we shall call this area the "protected area." The areas which are not shaded on Map 6 represent areas which are more than 1000 feet from protected uses.

Geographically, much of the central portion of the City if [sic] Kent lies within the shaded protected area. That is much of the area stretching from West Hill, across the Valley and through downtown to the easy city limits on East Hill is either zoned for residential use or lies within 1000 feet of a school, park, or church.

On the other hand, the industrially [sic] zones valley lands lying generally north of S. 228th street and south of the Green River (including the agricultural lands on the west and south sides of the Green River) are outside of the shaded protected area. Of course, not all of the in shaded area os [sic] currently zoned for commercial purposes and, therefore, not all of this area is potentially suitable for adult businesses. Because current zoning policy does not allow commercial uses in industrial zone districts[14], virtually all of the M-1, M-2, M-3 and CM zones are unavailable for adult business without a mojor [sic] shift in zoning also do not allow commercial uses and are unsuitable areas for any type of adult business.

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[14] Only commercial office and retail uses which are supportive and complementary to industrial districts are permitted in the M-1, M-2, and M-3 zones. Such uses are authorized by the Hearing Examiner through the conditional use permit process (JEE, *Zoning Code* Sections 3.17.3, and 3.18.3, 3.19.3).

A closer examination of Map 6 and existing commercial zoning reveals several, small unshaded areas of potentially suitable commercial zoning for adult businesses. These locations are scattered around the city.

- Certain parcels located along Pacific Highway South in the Midway area of West Hill;
- Certain parcels located in an approximate two-block area of the Kent central business district, near the intersection of Second Avenue/Harrison Street;
- Certain HC and CC-zoned parcels located along the East Valley Highway north of its intersection with the Valley Freeway, and along S. 180th Street on the north end of the City.

While the above described locations are generally small and scattered, they do represent areas which are isolated from protected uses. Field checks by the Planning Department staff indicate a varied development pattern at these sites, one which is probably adaptable for a variety of adult uses.

It is quite obvious from Map 6 that large areas of the City's industrial district are located outside of the protected area. As mentioned, however, commercial uses are generally not permitted in the industrial districts under current zoning regulations. Nevertheless, for the sake of discussion and analysis, if existing zoning were to be modified to allow business activities in all or some of the industrial zones, substantial areas of the City would be opened up for adult use location which would be removed from Kent's primary residential, religious, educational, and recreational areas. Such a change would

represent a major shift in zoning policy since the industrial zones would then be opened up to commercial development of all kinds.

Zoning Alternatives for Kent

Table ___ lists five alternatives for adult use zoning in Kent. A brief explanation of each alternative is included along with an abbreviated evaluation of its advantages and disadvantages.

Alternative 1 is the "No Action" alternative. No changes to existing zoning regulations would be pursued under this alternative. Adult uses would continue to be undifferentiated form [sic] like, nonadult business activities and would be permitted outright in appropriate commercial zones.

Alternative 2 is a modified dispersion approach for commercial zones. Under this alternative, specified adult uses would be permitted in the several small, scattered commercial districts generally identified on Map 6 as being located more than 1000 feet from any residential zone, church, public park or school. To discourage clustering of adult uses in any one of these small districts, a dispersal requirement could be included which would require a minimum distance between two or more adult uses.

Alternative 3 would permit adult uses in industrial zones. Uses could either be concentrated or dispersed in selected industrial areas, depending on specific regulations. It is contemplated that only industrial zones lying north of approximately S. 228th Street (and lying in the unshaded area on Map 6) would be considered as suitable

locations for adult businesses. This alternative represents a significant change in current zoning policy since it requires opening up industrial zones to commercial/ retail development.

Alternative 4 would allow adult uses in selected commercial areas only by conditional use permit. Approval of use would be made by the Hearing Examiner after public notice and hearing, pursuant to zoning code, Section 8.3.2. The application for adult use of a proposed site would be subject to review according to a number of adopted guidelines or criteria which could be added to the zoning code.

Alternative 5 would prohibit some or all adult uses altogether. Definitions would be developed for specific types of adult uses which would then be prohibited by specific regulatory language.

The "No Action" alternative represents the least effective approach since, under existing zoning policy, adult uses would be allowed in most commercial zones irrespective of their location relative to schools, residences, parks and churches.

Perhaps the most effective approach is represented by Alternative 5 (Prohibition of Specific Uses) which would prohibit certain adult uses altogether. While this alternative affords the greatest potential protection to the community from the impacts of adult uses, it may be the most legally uncertain alternative inasmuch as it may interfere with First Amendment (free speech and press) rights enjoyed by certain adult uses (such as adult theaters and bookstores).

Alternatives 2, 3, and 4 all differ slightly in their approach to adult use zoning, but they are probably similar in their effect – that is, all seek to protect schools, residences, churches, and parks. Alternative 3, which would allow adult businesses in industrial zones, probably presents the worst problems as far as implementation is concernted [sic]. Allowing adult businesses would also necessarily involve allowing other general business activities, undermining the puirpose [sic] of the industrial zoning district and detracting from downtown goals. Alternative 2 would restrict adult uses of appropriate commercial zones, although the total number of available sites may be quite limited. Administration of Alternative 4 is expected to be the most costly since it would involve a lengthy public involvement process each time adult use was proposed. It also could be susceptible to inconsistent or discriminatory treatment of adult use applications.

Economic Costs of Zoning Alternatives

Two kinds of costs are associated with adult use zoning. First, there is the direct cost of administering the zoning ordinance, of creating, adopting, and applying the specific regulations. Second, there is the indirect cost of enforcement services associated with the policing of these uses. In the view of the Planning Department staff, however, the costs of administration and enforcement services are secondary to the benefits of protecting the community's residential, religious, educational, and recreational environments from potential land use incompatibilities.

The costs of administration, particularily [sic] the costs associated with developing and implementing the specific adult use zoning regulations, could be mitigated by combining this effort with the on-going zoning ordinance revision project. Also, enforcement costs are currently low; very few adult uses other than gambling presently exist in the Kent community. Given the development of adult uses under either of the five zoning alternatives mentioned in the previous section, the difference in enforcement service costs is thought to be minimal.

Study Recommendation – Preferred Alternative(s)

Based on the preceding evaluation of alternatives and the findings of this study, *the Planning Department recommends that the City Council endorse Alternative 2 (Modified Dispersion in Commercial Zones)* and, furthermore, that the City Council direct the planning staff to develop adult use zoning regulations consistent with this approach, such regulations to be reviewed by the Planning Commission for recommendation to the City Council. Specific elements of these regulations should include:

1. *Designated Commercial Zones where adult uses are permitted.* This area should be reasonably separated from such uses as schools, parks, churches, and residential areas. Commercial areas which may be considered under this alternative include the "unshaded" commercial zones shown generally on Map 6 of this study.

2. *A dispersal requirement.* Regulations should require that a minimum distance be maintained between two or more adult uses within the designated commercial zones.

3. *Specific definitions of regulated adult uses.* Regulated adult uses should be well-defined so as to destinguish [sic] them from other business activities.

4. *Gambling activities to be excluded from such zoning regulations.* At this time, gambling activities are regulated under the State Gambling Act of 1973 and not considered a threat to Kent's residential, religious, educational, or recreational environments. Additional zoning regulations pertaining to gambling activities would not be a part of this zoning proposal.

While Alternative 2, above, may be preferable, the Planning Department staff also believes that Alternative 5 may be entirely realistic in spite of its uncertain legal status. As shown by Map 6, much of Kent's commercial zoning lies within a short distance of the community's schools, residences, parks, and churches. If these uses are to be protected from the impacts of incompatible adult businesses by a minimum distance standard, a substantial portion of the City's commercial zoning is unsuitable for adult businesses. In addition, given that current zoning regulations do not allow commercial uses in industrial zone districts, much of the area that is separated from schools, residences, churches, and parks is, in fact, unsuitable for adult businesses. Based on these facts, a realistic and defensible regulatory approach may be expected to be compatible with other general business activities in the City's several commercial zones.

REFERENCES

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Weinstein, Alan. "Regulating Pornography: Recent Legal Trends," *Land Use Law*, February 1982.

EXHIBIT B

KENT PLANNING COMMISSION MINUTES

October 28, 1986

The meeting of the Kent Planning Commission was called to order by Chairman Ward at 7:30 p.m. on Tuesday, October 28, 1986, in the Council Chambers.

COMMISSION MEMBERS PRESENT:

Raymond Ward, Chairman
James Byrne, Vice Chairman
Robert Anderson
Robert Badger
Anne Biteman
Richard Foslin
Linda Martinez
Nancy Rudy

COMMISSION MEMBER ABSENT:

Jill Spier, excused

PLANNING STAFF MEMBERS PRESENT:

James P. Harris, Planning Director
Jim Hansen, Principal Planner
Fred Satterstrom, Project Planner
Bruce Creager, Associate Planner
Ed Heiser, Assistant Planner
Lin Ball, Assistant Planner
Lois Ricketts, Recording Secretary

APPROVAL OF PLANNING COMMISSION MINUTES FOR AUGUST 19, 1986

Commissioner Foslin MOVED and Commissioner Byrne SECONDED a motion to approve the August 19, 1986, Planning Commission Minutes. Motion carried.

Mr. Harris mentioned that the next City Council meeting will be held at Sequoia Junior High School on Monday, November 3, 1986.

HAROLD JAMES CPA #86-1 COMPREHENSIVE PLAN AMENDMENT

Bruce Creager presented the request to change the land use map from its existing Comprehensive Plan designation, the current Residence-Agriculture, RA, to Multi-family Dwelling, MF, designation.

The request has been made to the City of Kent to make an amendment to the Kent Valley Floor Subarea Plan which was adopted by the City of Kent in July 1979 and was amended in February 1981. The property is six acres in size and is located on the south side of 212th Street between approximately 94th Avenue South, if extended, and 92nd Avenue South, if extended.

The property is irregular in shape and has a depth that varies from 990 feet to 330 feet southerly beginning at the frontage on South 212th Street. The property surrounding the three sides of the subject property is zoned Single Family Residential, R1-12, with 12,000 square foot minimum lot size. To the north, across 212th Street, the property is zoned SR 9600 (King County). Other zoning designations in the vicinity of the site, but not necessarily adjacent, are predominantly single family residential and range from densities of 7,200 square foot minimum lot size to one-acre minimum lot size. Other zoning designations include Garden Density Multifamily Residential,

MRG, (16 units per acre maximum density) and Duplex Multifamily Residential, MRD, with a Mobile Home Park Combining District overlay zone. The latter parcels are smaller and located adjacent to the Valley freeway at lower elevations and have gentler slopes than the subject property.

The subject property is largely undeveloped with the exception of the existing trails. A water main extends along the trail. The site is largely wooded with both deciduous and evergreen trees, heavy underbrush and native grasses. There are also natural springs on the site. To the west of the subject property is tax lot #89 under the same ownership and also undeveloped, but this five-acre property is proposed for retention in its RA, Residence-Agriculture, Comprehensive Plan designation.

To the northwest of the subject property, across 212th Street, is Saar Pioneer Cemetery which was established in 1873. Surrounding the cemetery is a 12.73-acre site that is approved for development of an 88-pad mobile home park known as Silent Meadows Mobile Home Park. Although substantial grading has occurred on the site since it approval, further development has not taken place. To the east of Silent Meadows is undeveloped property that has significant slopes that are heavily wooded and vegetated up to the crest of East Hill. The north fork of Garrison Creek runs through this property.

The subject property was originally annexed to the City on July 15, 1977, as part of the 60-acre Lean Annexation (Ordinance #2035). The following land use actions are quoted from the staff report:

Ryan Annexation #3 (#AZ-86-1)

This property was annexed into the City in March of 1986 and the recommendation for initial zoning of R1-9.6, Single Family Residential, 9,600 square foot minimum lot size, was submitted by the Hearing Examiner to the Kent City Council on June 4, 1986. This property is 14.64 acres and is located on the south side of South 218th Street to the west of 98th Avenue South (extended), and includes significant constrained areas and varied topography, including the Garrison Creek and its ravine. Slopes average 14-15 percent, and range up to 40 percent. The East Hill Comprehensive Plan land use designation is SF6, Single Family 4-6 units per acre, for this property. Substantial concern was raised by residents in the vicinity of the site who stated opposition to the staff-recommended zoning of R1-7.2. These residents stated a strong preference for zoning consistent with adjacent development, either R1-20 or R1-12. The Kent City Council approved the initial zoning at R1-20, 20,000 square foot minimum lot size.

Crow-Spieker-Hosford Rezone (#RZ-86-1)

This proposal was to rezone 2.2 acres from M2, Limited Industrial, to GC, General Commercial. The site is located at the northwest corner of the intersection of South 212th Street and East Valley Highway. The Valley Floor Comprehensive Plan designates the property as IP, Industrial Park. The Hearing Examiner recommended denial of the rezone request due in part to the inconsistency with the Comprehensive Plan. Despite an appeal filed by the applicant, the Kent City Council adopted the findings of the

Hearing Examiner and concurred with the recommendation for denial.

Harold and Patricia James Rezone (#RZ-76-8)

The applicants applied for a rezone from RA, Residential Agricultural, to MRM, Medium Density Multifamily Residential, on a five-acre parcel located at the southeast corner of the Valley Freeway and South 212th Street. The City Council approved the rezone to MRG, Garden Density Multifamily Residential, on November 1, 1976. The State Department of Transportation acquired the property for construction of a northbound freeway off-ramp which is presently under construction.

Silent Meadows (#RZ-83-2 and #CD-MHP-83-1) received approval from the Kent City Council in 1984 for the rezone of 12.73 acres from RA, Residential Agricultural, to MRD, Duplex Multifamily Residential, and approval of a Mobile Home Park Combining District to allow the construction of an 88-unit mobile home park.

The property is located on the east side of the Valley Freeway between South 208th Street and South 212th Street, and surrounds the Saar Pioneer Cemetery on three sides. This proposal was approved to allow a substantial amount of grading and filling up to the 50-foot contour line where heavily vegetated and steep slopes begin. The Hearing Examiner found that there exists on the property a flat bench that would allow a higher development density even though the RA Comprehensive Plan land use designation and RA zoning designation were in place. The Hearing Examiner also found that in this case

the steep slopes could be preserved with the proposed site development.

Evergreen Hills Subdivision (#SU-79-3)

This 21-lot hillside subdivision is located to the east of the subject property. The preliminary plat was originally reviewed in 1979; however, the final plat approval did not occur until adoption of Ordinance #2625 on April 21, 1986, and was subject to conditions.

The conditions included the requirement that "the site not be graded or recontoured on a massive scale; that vegetative cover be maintained on the site in the same manner as was done for the Highridge development." The ordinance also recognized the difficulty of the City of Kent Fire Department to deliver fire suppression and emergency medical services during inclement weather to this subdivision. Therefore, the plat owner and developer were required to deliver to purchasers, prospective purchasers and real estate agents a letter from the City concerning the difficult Fire Department access to these lots and addressing fire suppression measures including the recommendation for sprinkling systems in all homes.

The subject property has access to South 212th Street. Any traffic generated by the proposal will impact the level of service of the South 212th Street corridor. A change in the Comprehensive Plan to Multifamily designation would promote development that would more than double the traffic from 220 average daily trips to 528 average daily trips. These additional trips could cause a visibility problem for those cars exiting off 212th Street.

The topography ranges from 180 feet at its highest elevation down to 50 or 60 feet at its lowest point. There are springs and surface water present on the site, even in the summer months. Garrison Creek flows adjacent to the subject site and the City of Kent is anticipating the construction of a regional storm water detention system at the bottom of the hill. They have been in the process of acquiring properties from the applicant and other property owners in the vicinity.

The Soos Creek Plan designates the property as Single Family, one unit per acre. The easterly portion of the site is designated on the Soos Creek Plan as open space, a designation used when there are development constraints such as steep slopes or soil conditions.

The Valley Floor Subarea Comprehensive Plan was adopted by the Kent City Council on July 2, 1979, by Resolution #873. The goal is to assure environmental quality in residential areas by preserving and maintaining as much of the natural envvironment [sic] as possible and to prohibit residential development in areas unsuitable for development (e.g., steep slopes, swamps, etc.). The following Planning Department Comment is quoted from the staff report:

> Planning Department Comment
>
> The proposal would result in a land use designation that would promote an increase in residential density and a diversity of housing types. The introduction of multifamily to the predominantly single family residential development in the vicinity of the proposal would cause a significant change in the character of development on these slopes of the East Hill. The site has a

> variety of environmental features that include substantial evergreen and deciduous trees, slopes that range from 10 to 40 percent with an average of 12 percent across the site, and evidence of springs on site. Development on the adjacent slopes has been low density, in conformance with the Comprehensive Plan and Zoning Code, and has fit into the natural environment without significant disruption. There is no evidence to show that the proposal will result in preservation of the natural environment, and further will not disrupt the fabric of the prevalent single family development that exists along the East Hill slopes

The natural resources' goal is to preserve and protect vital habitat for species common to the valley floor. The following Planning Department comment is quoted from the staff report:

> Planning Department Comment
>
> Multifamily development will have greater land use impacts than single family development due to the substantially higher percentage of site coverage, population density and associated levels of activity. It is the opinion of the staff that the protection and preservation of habitat is best achieved by the designation of the lowest density land uses. The hillside of the East Hill offers a substantial amount of natural habitat and environment that is of special value to the community that should be preserved and protected by retention of the existing low density comprehensive plan land use designation and by retention of low-density residential zoning.

The following findings and conclusions are quoted from the staff report:

FINDINGS AND CONCLUSIONS

A. The Valley Floor Comprehensive Plan designates the property as Residence-Agriculture, RA, and the Soos Creek Plateau Communities Plan (King County) is in agreement as it also designates the property as Residence: one unit per acre, with portions of the site depicted for open space due to environmental constraints.

B. Surrounding area properties are also of the same Comprehensive Plan land use designation or are similar with a lower density residential designation.

C. The Valley Floor Comprehensive Plan supports the preservation of environmental quality in residential areas and the protection and preservation of ecosystems. Evidence does not support the fact that a change in the Comprehensive Plan designation would provide this protection on this site.

D. Although the capacity of South 212th Street exists to handle an increase in vehicular trips, there is concern over the traffic safety problem that could be created due to the limited sight distance of westbound traffic on South 212th Street coming off the East Hill.

E. The change in land use as proposed would interrupt the fabric of the low density residential development on the hillside of the East Hill.

F. Previous land use actions in the area of the proposal which have resulted in an increase in zoning intensity are on properties that

abut Valley Freeway, are lower in elevation and do not have significant environmental constraints, such as steep slopes or wooded areas.

G. There is significant concern over the ability of Kent Fire Department to deliver emergency vehicle services on roads that exceed 12 percent slope. An increase in land use intensity would likewise increase the number of Fire Department calls to the site, and restricted access due to steep slopes could jeopardize greater numbers of people residing on the site.

The Planning Department recommends denial of the applicant's request to amend the Valley Floor Comprehensive Plan from RA, Residence-Agriculture, to MF, Multifamily Dwelling, for the subject site.

Commissioner Badger asked which plan controlled the subject property.

Mr. Creager felt that both plans should be considered in the deliberation of this application, but the Valley Floor Plan was adopted by the City of Kent, and the Soos Creek Plan was adopted by the County.

Commissioner Badger asked if RA was the designation for a holding zone.

Mr. Creager responded that it was intended for low-density development but could be used for residential purposes.

Mr. Harris added that often the Comprehensive Plan designation of RA has a different underlying zoning, which in this case is R1-12.

Chairman Ward asked if the staff's recommendation was based on the Comprehensive Plan or on the traffic situation on 212th.

Mr. Creager responded that it was a combination of those factors. He felt that the traffic situation could be mitigated with the exception of the potential for accidents occurring at the intersection due to sight visibility problems, but it was the combination which led to the denial of the application.

Commissioner Rudy asked if the vegetation were not there to hold the soil, would the slope be great enough to present a hazard to the houses above.

Mr. Creager replied that he had seen the soils study submitted by the applicant which stated that the soils were relatively stable on the property. There were some areas which had been identified on the hazard area map. These had either steep slopes or soils with some seismic hazards. These had been referenced in the soils study and were unsuitable for development.

Commissioner Martinez asked what effect the grading of the Silent Meadows property has had on the area.

Mr. Harris responded that this project had been abandoned.

Mr. Anderson asked about the status of tax lot #89.

Mr. Creager replied that this property is owned by Mr. and Mrs. James and is not part of this request. The City is in the process of acquiring the property for water retention.

Lawrence Campbell, 1609 Central, Suite A-1 , Kent, Washington 98032, stated that the request is to amend the existing land use plan map from the current R1 designation to Garden Density Multiple Residential. The density would be a maximum of 16 dwelling units per acre under this designation. The site plan which they have developed shows a density of 11.3 units per acre, which is less than the amount allowed and one half of the density allowed under MRM. He felt this would be in character with the majority of the residential zoning on the toe and upper slopes of the East Hill. He pointed out three topographical areas surrounding the subject site – valley floor, hillside slope, Soos Creek Plateau. He pointed out that there would be no vehicular circulation between the lower and upper hillside areas. He entered pictures into the record that showed the condition of the roadways after the completion of the 212th system as it exists at the present time.

Mr. Campbell read into the record a letter from Ivan Christiansen, 23030 164th SE, Kent, in which Mr. Christiansen expressed support of this request stating that he felt there were too many single family lots in the area. He has had difficulty selling his lots. He felt that the James property was isolated visually from 212th, but because of the traffic noise generated on 212th, it was not suitable for single family residence use. Single and/or two-story buildings could be built on the James property without affecting the view from any of his lots.

Mr. Campbell listed the following hidden advantages for reevaluating the comprehensive plan:

1. By encouraging multifamily zoning in this area, we allow the higher density developments closer to the major access roads which will reduce the pressure on the overburdened East Hill road system.

2. If there is going to be more multifamily development in the Kent area and the demand continues to exist, then downtown Kent will benefit from having that development closer to the core area.

3. This area, and the James site in particular, are no longer suited for single family or RA development. He felt that if you walked this ground, you would not perceive it as single family residence property, especially with the on and off ramps to the freeway and the City's plans to develop the property to the west into a major storm drainage retention basin which would eliminate much of the remaining RA zoning or use as RA zoning.

He pointed out that the area used for the on and off ramps for the freeway was formerly the James property and had been zoned MRG. He stated that the area zoned RA is the only remaining RA-zoned property from the applicant's property to James Street, and that this is being purchased by the City for storm water drainage. He expressed concern about the precise plans for this project and wondered if the area would have public access.

He felt that the James site was unique because the surfaced streets serving the site were complete and operational. The traffic generated by the development has easy on and off access to the Valley Freeway and has direct routes to the industrial areas of the valley without having to pass through any other residential area. Sewer and water are available on the site.

Mr. Campbell felt there was no demand for the property in this area to be developed into single family residences at the present time. The existing MRG zones have a nearly identical relationship to the hillside and valley floor as the James site, and that by reclassifying the James site to MRG would be a repeat of a situation that already exists. He felt there would continue to be a need for multiple housing, and that Kent should look to this area to satisfy the demand because of the proximity to major service streets and the use pattern that has already been established. This area is isolated both physically and visually from the single family residential area on the plateau above. The construction of on and off ramps on the Valley Freeway and pending development of the storm water retention basin have significantly altered the character of the site.

Mr. Campbell pointed out that Mr. James had asked that he be allowed to use his remaining property in a manner appropriate to its setting and to its marketability. A low-profile garden density development as depicted on the site plan he felt would be an effective use of the property, would not disturb the hillside, would have little impact on the surrounding uses, and would be least affected by the adjoining land uses. This development would be using only 65 units instead of 80 reported in the staff report.

Mr. Campbell entered into the record the report of the soils investigation provided by Golder Associates Consulting Geotechnical and Mining Engineers report, dated April 1, 1986. He also entered the maps which he used in his presentation.

Patricia James, property owner of the subject site residing residing [sic] in Enumclaw, explained that she has planted hundreds of evergreen trees over the past years hoping that these would release oxygen into the air and absorb some of the carbon monoxide from South 212th and the Valley Freeway. She plans to continue this planting project even though the last trees she planted were removed when the road was widened.

Harold James, 23735 SE 471st Street, Enumclaw, property owner, pointed out that he would not be utilizing any slope over 12 percent for the proposed project. He had paid for the access to the subject property, which is currently in place, and also the left-hand turn lane. The soils would pose no problem that could not be solved for this type of development. Several years ago he had put in sewers as part of an LID. In January 1986 he approached the Planning Department with a plan that included open space. Mr. Harris had informed him that a soils test was needed before requesting a comprehensive plan review. In August 1986 the Kent Engineering Department made an offer to use the lower part of the property as a water retention basin. Based on this commitment he dropped his plans to use the open space and reduced the number of units planned for the development. Mr. Campbell had devised a plan for the remainder of the property taking into consideration the available access and the topography of the site.

Lester Pool, 21421 94th Place South, owner of the property bordering the subject site on two sides, felt that the impact of the rezoning would be devastating to him as a landowner. Before he purchased the 1.68-acre site in July 1979, he had investigated the area and the zoning. During

the past seven years he has remodeled his 700-square foot home several times. It is now a 2,700 square foot home. He resents the proposed rezoning of the James property because of the environmental impacts he feels it would place on the neighborhood. The landowners in the area own property for animals and personal use. He felt that there would be a significant social impact of persons entering the adjacent private property since no play area would be available close to the site. The freeway abuts to the west, and the closest park would be on South 218th at the top of the hill, inaccessible to this development. The proposed development would be served by a roadway system within itself.

Mr. Harris entered into the record a letter received from Linda and Ron Anderson, 21417 94th Place South, stating that they oppose the zone change. They felt that Highway 167 is a good boundary line.

Larry Campbell responded that the proposed structures would be built in character with the other homes in the area. There would be a buffer zone between the multi-family and single family dwellings. He did not feel there would be any chance of persons living in the proposed rezone area using the property which is owned by the single family residents, because each area would be isolated. He explained that the proposed development would be a low-density, low-profile residential area.

Terry Mullen, 33418 179th Avenue SE, Auburn, stated that she was employed this past summer as a "nanny" for Mr. Pool's children. Even during the summer months she found the area to be very wet. She considered the location to be a beautiful place to have children because of the

coyotes, blue heron, ducks and other animals. She pointed out that there are four houses being constructed at the present time. She considered the area to be beautiful from within and from the freeway.

Jim Hansen reminded the Commission that the issue was a change in the general land uses shown on the Comprehensive Plan Map, not a site-specific rezone. He felt the testimony of the applicant's agent had been concerned with the specific. The more appropriate question might be whether or not this is an appropriate location for multifamily development. This is not a question of density. Kent has issued four single family dwelling permits in 1986. Nearly 2,000 multifamily permits were issued for multifamily dwellings last year. It is expensive to build on steep topography. He felt that the location was appropriate for low density, single family housing because that type of development can accommodate slopes by avoiding them. Single family housing would also lessen the potential traffic impacts on South 212th. Single family homes can be situated nicely in the area and be buffered from the freeway noise and still take advantage of the lovely setting.

Regarding the testimony of the MRG-owned parcel located west of this site and adjacent to SR 167, this property was acquired by the State of Washington for the new interchange. The applicant was paid a fair market price for this multifamily parcel. After this initial recommendation is determined, the Planning Department will look at the area from the toe of the slope to the industrial area considering possible future uses. He asked the Commission to consider the most compelling reason for a

change from low-density single family residential to multifamily residential. The Planning Department could not find sufficient reason, thus a denial had been made by the Planning Department.

Commissioner Rudy asked if this were considered to be a unique and fragile area.

Mr. Hansen responded that it is not classified on the maps as unique and fragile. This property is adjacent to a hillside which is fairly undeveloped, and there is wildlife in the area. Garrison Creek runs adjacent to the area. Because of the creek, certain setbacks are required so that the quality of the water and the environment along the stream is not disrupted.

Commissioner Byrne MOVED to close the public hearing. Commissioner Anderson SECONDED the motion.

Commissioner Foslin asked what impact the blacktop would have on the area below it and how multifamily development would affect the runoff.

Mr. Hansen responded that at the time sites are developed, the Planning and Engineering Departments look closely at the storm water runoff. The City of Kent has a storm water utility, consequently improvements which occur in the City tie into an overall master plan for removal of storm water. The detention facility which was mentioned earlier is part of Kent's overall plan to remove excess water. Detention facilities store water for an interim period so that during periods of high runoff these facilities are used to store the water which allows staging of the water as it moves across the City into the Green River. There are periods when the river gets too high. The

storm water detention facilities help to hold the water and keep it from causing excessive flooding until it drops to a point in which additional storm water can be pumped into the river.

Commissioner Badger asked when the drainage plan for storm water retention at this site would be known.

Mr. Hansen responded that the plan is being designed at the present time. The site has been determined and is being acquired. Action has begun, but no specific information is yet available. He added that the City does well in the coordination of public facilities to make certain there is adequate buffering between the development and adjacent uses.

Commissioner Anderson expressed concern about access to 212th, a busy, dangerous street on which cars frequently exceed the speed limit. He pointed out that there is a large amount of open space visible from the freeway north of James Street and continuing into Renton. He felt this area should remain in its present designation, RA.

Commissioner Byrne asked if the turn lanes were put in with the idea of single family or multifamily development.

Ken Morris, Kent Traffic Engineer, responded that this was one of the measures used to mitigate the traffic coming off the hill. There is a left-hand turn lane and a deceleration lane for vehicles to get out of the stream of traffic.

Chairman Ward expressed concern about the wildlife and beauty, but he felt that Kent is changing and that the Commission must consider the growth trends in the area.

Commissioner Byrne pointed out that the first step in the rezone process is to change the Comprehensive Plan. After the plan has been changed, a rezone could follow.

Commissioner Badger felt that since the Planning Department will be reexamining [sic] this area, he recommended that the Commission accept the Planning Department's recommendation for the subject property to remain RA, Residence-Agriculture, at this time and deny the applicant's request with the understanding that this area will be incorporated into the review which the Planning staff will be conducting in the near future for the entire area.

Commissioner Badger MOVED that the Commission accept the Planning Department's recommendation that the area remain Residence-Agriculture, RA. Commissioner Rudy SECONDED the motion. Motion unanimously approved.

ADULT USE ORDINANCE DRAFT

The City Council Planning Committee directed the Planning Commission to consider and develop an ordinance which would regulate theaters and bookstores in the City of Kent.

Ed Heiser showed on a map the areas involved and pointed out that adult theaters and bookstores would be prohibited within 1,000 feet from any single or multiple family residential use, any private or public school, any church or other religious facility or institution, or public park.

Commissioner Martinez asked about the word "substandard" on page 2, Section 2 A 15.02.006 *Adult Bookstore*, the last word in this paragraph.

Mr. Heiser responded that this should have been "substantial."

Commissioner Badger MOVED that the Planning Commission approve the Adult Use Draft Ordinance with the word "substandard" being corrected to read "substantial." Commissioner Rudy SECONDED the motion. Motion carried unanimously.

WEST VALLEY INDUSTRIAL STUDY: PROPOSED AMENDMENTS TO VALLEY FLOOR PLAN AND ZONING CODE

Fred Satterstrom presented the staff report stating that the presentation would be divided into two parts:

Proposed Comprehensive Plan Proposed Zoning Amendment

Mr. Satterstrom presented a proposed amendment to the Valley Floor Plan called the "R-suffix." The "R" stands for "retail" and the "suffix" means that the "R" designation would be added to the industrial area. This "R" designation would be part of the Comprehensive Plan.

He stated that the Planning Department is proposing to place an overlay designation on the Valley Floor Plan which would show three circles. These "R-suffix" circles would be explained in the text as strategic intersections or nodes within the industrial area which represent potential sites for expanded retail opportunity. Mr. Satterstrom explained that this first part of the hearing would be laying the groundwork for the second part of the

hearing. The first part would merely introduce the notion of retail-type uses in the industrial area at certain points on a limited basis.

Commissioner Badger asked if the word "node" meant a specific or an approximate area.

Mr. Satterstrom responded that it would be an approximate area defined through the zoning process. The node would be the point where the roads intersect. The industrial area has gone from mainly manufacturing type of uses to a mixed type of use located in multi-tenanted industrial, commercial or corporate parks, particularly in the West Valley area. Now there are as many as 50 different types of uses in one complex, many of which are service oriented. Nearly all of these service types of uses have a high employment density. Kent has approximately 30,000 persons employed in the valley area, 13,000 of these are employed at the Boeing facility in the West Valley area. The daytime population is equivalent or larger than the nighttime population for the entire City of Kent. This proposal introduces the idea of allowing certain uses at strategic locations in the industrial area to help serve the daytime population. If recommended by the Commission and adopted by the Council, Kent would merely have three new circles with a definition on the Valley Floor Plan which would help set the stage for later zoning amendments. Mr. Satterstrom requested that the meeting be continued to November 25 in order to allow for additional time for further testimony and time for a complete environmenal [sic] review of this issue. This would also provide more time for additional comments.

Commissioner Rudy asked if the circles would follow distinct boundaries.

Mr. Satterstrom responded that they would.

Commissioner Martinez wondered if the "R-suffix" were adopted, would it be possible to add another node as growth takes place within the City of Kent.

Mr. Satterstrom responded that the Comprehensive Plan could be changed again. This would be the process to be used to add additional areas. If another intersection loomed advantageous for this type of designation, this should be indicated on the Comprehensive Plan through this same process.

Chairman Ward opened the public hearing.

Ted Knapp, representing Upland Industries, 16400 Southcenter Parkway, Tukwila, and the Kent Chamber of Commerce, read into the record the following letter from Mary F. Williams, President, Kent Chamber of Commerce Board of Directors, dated October 23, 1986:

> October 23, 1986
>
> TO: City of Kent Planning Commission
>
> [LOGO]
>
> FROM: Mary F. Williams, President
> Kent Chamber of Commerce Board of Directors
>
> FOR: October 28, 1986 Public Hearing
>
> RE: West Valley Industrial Study
>
> The Kent Chamber of Commerce commends the Kent Planning Department for undertaking the West Valley Industrial study. The effort is timely and the business community appreciates the

Planning Department's openness and consultation with the private sector during the preparation of the report.

As of October 15, 1986, the following is the Kent Chamber of Commerce's position based on happenings to date: in general, the Chamber supports the findings and recommendations outlined in the study. Allowing office uses and expanding retail opportunities within the study area is an appropriate response to the changing dynamics of the market place. It will also provide for a more balanced and diversified economic base. Likewise, the Chamber supports establishing mechanisms aimed at increasing site development flexibility. The existing code is outdated, inflexible, and in some instances encourages substandard development.

The Chamber, like the City staff, recognizes that by allowing more office and retail uses in the Valley, employment densities and traffic will increase. Programs designed to mitigate the traffic impacts must be developed and implemented. These programs should include measures to better manage traffic resulting from development as well as identify revenue sources for the construction of necessary street and highway improvements. Any such program must, however, be done in a comprehensive and equitable manner. The Chamber stands ready to assist the public sector in developing such programs.

Although it is not specifically stated as a recommendation, the study refers a number of times to the possibility of implementing parking maximums as a means to mitigate traffic impacts. The Chamber is opposed to such a measure.

Parking maximums will most likely encourage those companies requiring more parking to locate in other communities.

In order to implement the recommendations of the study, a great deal of enabling legislation must be developed which will be subject to a public review process. A number of existing ordinances will likely require modification. The Chamber looks forward to receiving the pertinent information and encourages the City to continue its policy of soliciting input from interested groups as the material is developed.

The Chamber further encourages the City to quickly expand its study efforts to the remainder of the Valley floor. The area of particular concern is along South 212th Street adjacent to the newly completed interchange at SR167. Due to the new interchange, it seems appropriate to re-examine the permitted land uses in this area.

Thank you for the opportunity to comment.

Mr. Knapp explained that this letter expressed the position of the Chamber of Commerce on October 15, 1986, and was written in response to the West Valley Industrial Study. The "R-suffix" issue was not available at that time, consequently the position stated in the letter did not reflect this issue. Representing Uplands Industries, he expressed the same thoughts and feelings expressed by the Kent Chamber. He commended the Planning Department for their openness and cooperation in the study, foresight in seeing this need, and taking a proactive rather than reactive stance regarding this issue. He also expressed support for allowing office uses outright in the M1 district. He supported allowing a wider range and

variety of retail uses than the Zoning Code currently allows in the M1 areas. He also supported more site flexibility, because the Zoning Code has become outdated and inflexible in some sections.

He felt that by allowing these changes there would be traffic impacts; then programs which would mitigate these impacts would follow. He felt this should be done in a more equitable and comprehensive manner than in the past. The City has designated certain corridors and has begun assessing some impact fees on certain areas, but it has not been done on a City-wide basis. He mentioned that some of the streets have been surfaced in a peacemeal [sic] manner. The City of Kent has been diligent in requiring developers to pay for their street improvements as they develop or sign no-protest LID covenants, but at the present time there are fragmented streets in some areas which will do little to mitigate traffic congestion until the entire project is completed. He used as an example Fourth Avenue leading to 212th. Also, 72nd and 64th Avenues were starting to develop in the same way. He suggested that the City look ahead and come up with ways to complete the streets ahead of development, particularly when they have developers who are willing to pay a major portion of the cost.

Mr. Knapp personally opposed implementation of parking maximums as a means to mitigate traffic. This appeared to be a solution, but with the type of developments that exist in Kent, it is impossible to get enough people into busses to make the type of impact needed. He stated that in Redmond and Bellevue cars are parked in landscaped strips and in street areas, and in some cases the lack of adequate parking has been a deterrent for

some industries to locate in the area. He mentioned that Redmond nearly lost Microsoft over the parking maximum. He did support working with Metro to establish new routes in this area, and also working with major employers, such as Boeing, to come up with flex time.

He supported office use in M1 and greater flexibility in the site plan. His only concern was in the area of retail uses. The mixed use development process and the master plan option both mentioned that they would allow not only a mix of the types of buildings in developments, but also a mix of uses. If this mix of uses included retail, must it be within one of the nodes shown on the map, or could it be developed in another location on the property. He felt that if retail uses were going to be allowed only in the nodes, it would be very limited. He used 212th as an example pointing out that three fourths of this node would probably not develop as retail because O'Brien School is on one side, the southeast quadrant is developed, Boeing owns the property on the northwest quadrant and probably would not use the property for this type of use.

Out of the southwest corner, near 228th, three of the corners have already been developed or are in the process of being developed, consequently there would be limited retail in this area. He felt that there should be a greater amount of retail mixed within the project. He suggested that an amendment to encourage trucks to service from the rear of the building might ease the front yard setback.

He suggested that the word "substantially" should be softened on page 10 3d. He quoted:

d. Circumstances have changed substantially since the establishment of the current zoning district to warrant the proposed rezone.

On page 10 4a he felt that reference to the major arterial was ambiguous and felt that at some time it would be appropriate to put retail uses in what is now undeveloped properties. He quoted:

a. The proposed rezone is in close proximity or contiguous to major arterial intersections identified on the Comprehensive Plan Map as being appropriate locations for retail/ service type land uses.

He quoted from page 10 4b the following:

b. Rezoning to M1-R shall not be speculative in nature. Such requests shall be based on specific development plans and uses. Further the proposed uses shall be supportive to the surrounding industrial area and shall not be in conflict with land uses permitted in the Central Business District.

He felt it would be better to identify those retail uses that would be considered to be in conflict with the Central Business District and prohibit them from the industrial area. He felt there should be only retail uses that support the industrial employment base.

Mr. Knapp summarized by stating that he supports opening M1 to office use, broadening the retail base, site plan flexibility, and virtually everything in the West Valley Industrial Study. He felt that they should look at specific criteria regarding the "R-suffix" zone. This seems too tight at the present time and needs to be broadened. He

felt that he would be able to work with staff and possibly add additional testimony at the next hearing.

Larry Farren, real estate broker in the Kent Valley for Grubb and Ellis, also represented the landowners Don Benditi and John Barr who were unable to be present for this hearing. He expressed support of the proposed change in the Comprehensive Plan, but felt the circles were vague. He represented property owners at the edge of the circle.

Since there is a high vacancy rate for high-bay warehouses at the present time, he felt the property would be more desirable for office use. He felt that CPI had done an excellent job in developing office buildings and felt this was more appealing than the warehouses on East Valley Highway. He concluded by stating that he would like to sell this 80-acre parcel to one buyer for one unified development.

Chris Crumbaugh, attorney for Corporate Property Investors, complimented the Planning Department for taking the initiative to attack the problem of inadequate service or retail uses for those employed in the valley. Corporate Property Investors has been developing property which is diagonally across from the Boeing Aerospace Center. The buildings are presently occupied by Boeing. He expressed support of the "R-suffix" change to the Comprehensive Plan Map Amendment pointing out that the daytime population in Kent will soon exceed the nighttime population. These employees need retail uses to serve them. He felt that the uses should be broadened, but expected to be working with staff during the interim period between this meeting and November 25.

Bob Fadden, architect, Lance Mueller and Associates, 130 Lakeside, Seattle, complimented the Planning staff for their cooperation and efforts in working on the transportation studies. He felt that some good solutions had been generated and encouraged the Planning Commission not to panic regarding the traffic situation. He felt that the proposed amendment would have a long-term positive impact on the people who work in the valley, and encouraged the Commission to give their support to the retail, office uses and service uses that are necessary for the people who work in this area.

Commissioner Rudy MOVED and Commissioner Badger SECONDED a motion to continue the meeting to November 25, 1986. Motion unanimously carried.

WEST VALLEY PROPOSED ZONING AMENDMENT

Mr. Satterstrom stated that the staff would define the types of uses and procedures necessary to add "R-suffix" to the Zoning Code.

Lin Ball showed on the map the areas involved in the changes in the M1 zoning district for office and service uses. The change would remove the current restriction of 25 percent maximum of the floor area of any development to be used for office service use and allow 100 percent for office and service uses.

Many conditional use applications have been received which exceed the 25 percent. This seems to have been a trend as a result of the rapid industrial development which has taken place in the 70's and early 80's. The M1

is the lightest industrial zoning. Its development standards are more compatible with service and office-type uses.

Mr. Heiser spoke regarding the potential areas for expanded retail opportunities stating that staff is recommending the elimination of the 25 percent limit on the retail uses that are listed in the Zoning Code at the present time in addition to the expansion of the M1-R suffix at three intersections as identified by the circles. Staff would be making recommendations for standards and criteria for granting a rezone request so that staff would have a means to evaluate these requests in the future.

Ken Morris, Transportation Engineer for the City of Kent, has been working closely with the Planning staff on the traffic impacts on the West Valley area. Developers have said that they are willing to mitigate these impacts as long as it is handled in an equitable and reasonable manner so that these roads can be built to move traffic through the area with a good circulation system. The three corridors in the plan are 196th, 228th and 277th. At the present time the staff is looking at South 228th and South 212th to see if there are additional lanes needed to mitigate the impacts of higher intensity land use.

Commissioner Badger asked if 64th was going to be completed from 212th to 228th.

Mr. Morris responded that 64th Avenue South would be a parallel arterial to the West Valley Highway. It would go from 212th to Meeker Street. A portion of this would go to the Uplands facility and would terminate at 212th. Boeing is planning an entrance at this location for their

new headquarters building. A signalized intersection is planned at 212th, and possibly one will be installed at James and Meeker Streets depending upon the traffic volume. Another north south arterial may be 72nd Avenue, which would parallel West Valley Highway.

Commissioner Martinez asked if circulation meant movement within the industrial area or through the industrial area and out.

Mr. Morris responded that the circulation he referred to was within the industrial area. The 40,000 working population of Kent needs to move within the area as well as to get down into the valley. The arterials are planned to get traffic off the hillsides, but now they are looking at how traffic will circulate once they get into the valley.

Jed Aldridge, Kent Fire Department, expressed concern about the impact of the roads in providing the delivery of emergency services. At certain times of the day the traffic is at gridlock in certain areas, and the Fire Department has experienced difficulty in delivering emergency services in a timely manner. He felt that the plan did not address a way to mitigate this problem. For every 1,000 people working in Kent, there are 44 aid calls every year.

The north end needs a fire engine and a staff of three. He added that Kent has mutual emergency service with Tukwila and downtown Seattle, but there is no Kent emergency aid service in the north end at the present time.

Commissioner Badger MOVED that the hearing be continued to November 25, 1986. Commissioner Byrne SECONDED the motion. Motion carried unanimously.

AMENDMENT TO ZONING CODE TO ALLOW COUNSELING SERVICES

Ed Heiser presented the request to allow counseling services in the M1 and M2 zoning districts. In 1982 the Council amended the M1 and M2 zones and took out a simple sentence that offered guidance when the Planning Department had questions on particular uses that did not exactly fit the Zoning Code. The staff could refer back to that language to make an interpretation.

Following is the sentence that is suggested for return to both the M1 and M2 *Principally Permitted Uses* A 13 on pages 60 and 66:

"These uses are intended primarily to serve the needs of the industrial area, are compatible with the permitted types of industrial uses, and will not interfere with the orderly development of the industrial area."

The amended A 13 on page 60 (M1) would read as follows:

13. Retail and service uses as listed below. These uses are intended primarily to serve the needs of the industrial area, are compatible with the permitted types of industrial uses, and will not interfere with the orderly development of the industrial area. Such uses shall be limited to twenty-five (25) percent of the gross floor area of any

single or multibuilding development: Retail and service uses which exceed the twenty-five (25) percent limit on an individual or cumulative basis shall be subject to review individually through the Conditional Use Permit process. (See Subsection 15.04.180 D3.)

The amended A 13 on page 66 (M2) would read as follows:

13. Retail and service uses as listed below. These uses are intended primarily to serve the needs of the industrial area, are compatible with the permitted types of industrial uses, and will not interfere with the orderly development of the industrial area. Such uses shall be limited to twenty-five (25) percent of the gross floor area of any single or multibuilding development. Retail and service uses which exceed the twenty-five (25) percent limit on an individual or cumulative basis shall be subject to review individually through the Conditional Use Permit process. (See Subsection 15.04.170 D3.)

The Planning Department also suggests the addition of the words "Counseling services" to the lists in both the M1 and M2 districts, pages 60 and 67, under 13 e. *Professional services*

The amended 13 e on page 61 (M1) and page 67 (M2) would read as follows:

13 e. Medical and dental laboratory services
Legal services
Engineering and architectural services

Educational and scientific research services
Accounting, auditing, and bookkeeping services
Urban planning services
Counseling services

Commissioner Martinez asked if both changes were needed in both the M1 and M2 sections.

Mr. Harris responded that unless this wording was added to the Zoning Code in both places, it would be necessary for the Board of Adjustment to make these interpretations where it was not clearly stated.

Commissioner Badger MOVED that the four changes presented be adopted. Commissioner Byrne SECONDED the motion. Motion carried unanimously.

ADJOURNMENT

Commissioner Foslin MOVED to adjourn the meeting. Commissioner Byrne SECONDED the motion. Motion carried.

The meeting was adjourned at 11:15 p.m.

Respectfully submitted,

/s/ James P. Harris
James P. Harris,
Planning Director

EXHIBIT C

CITY COUNCIL AGENDA
Council Chambers

City of Kent
Office of the City Clerk

May 17, 1988
7:00 p.m.

[LOGO]

NOTE: Items on the Consent Calendar are either routine our have been previously discussed. Any item may be removed by a Councilmember.

CALL TO ORDER
ROLL CALL

1. PUBLIC COMMUNICATIONS
   - A. Oath of Office for Police Officers
   - B. Presentation to K-9 Thor
   - C. Proclamation – Pride in America Month
   - D. American Planning Association Award Presentation
2. PUBLIC HEARINGS
   - A. Formation of LID 333
   - B. Formation of LID 334
3. CONSENT CALENDAR
   - A. Minutes
   - B. Bills
   - C. Segregation – LID 316 – Resolution
   - D. Bill of Sale – Water Main Extension
   - E. Acceptance of Central Ave. Storm Drainage Project

F. Green River Pipeline Agreement Extension

G. Drinking Driver Task force Donations

4. OTHER BUSINESS

A. Council Chambers Remodel

B. Regulatory Standards for Adult Entertainment – Ordinance

C. Josey Glenn Preliminary Plat

D. Sanctuary #3 Final Plat

5. BIDS

6. REPORTS
CONTINUED COMMUNICATIONS
ADJOURNMENT

[Business License]

Kent City Council Meeting
Date May 17, 1988

Category Other Business

1. SUBJECT: ORDINANCE REGARDING BUSINESSES PROVIDING ADULT ENTERTAINMENT

2. SUMMARY STATEMENT: ~~Approve~~ Ordinance No. ___, regarding the establishment of regulatory standards for businesses, managers and employees that provide adult entertainment in the City of Kent. This ordinance was recommended for approval by the Public Safety Committee at its meeting on May 10, 1988 after the receipt of input and testimony regarding such establishments.

3. EXHIBITS: Ordinance, memorandum from City Attorney

4. RECOMMENDED BY: Public Safety Committee
(Committee, Staff, Examiner, Commission, etc.)

5. EXPENDITURE REQUIRED: $_____
SOURCE OF FUNDS: _____

6. CITY COUNCIL ACTION:

Councilmember BB moves, Councilmember Hsr seconds to approve Ordinance No. 2778 regarding the establishment of regulatory standards for business, managers and employees that provide adult entertainment in the City of Kent.

DISCUSSION: BB

ACTION: [Illegible Writing]

Council Agenda
Item No. 4B

OFFICE OF THE CITY ATTORNEY

DATE: May 12, 1988

TO: Mayor Kelleher and Councilmembers

FROM: Sandra Driscoll, City Attorney

SUBJECT: ADULT ENTERTAINMENT ORDINANCE

Presented for Council consideration is an ordinance regulating businesses, managers and employees that propose to provide adult entertainment in the City of Kent. This is in response to the Council's motion at its meeting on May 3, 1988, directing the City Attorney to explore all possible legal strategies relating to regulation of nude or semi-nude dance establishments. This memorandum briefly sets forth the legal background for the ordinance and then summarizes the ordinance itself.

SUMMARY OF LEGAL BACKGROUND

The United States Supreme Court and the Washington State Supreme Court have examined municipal ordinances that have either regulated or prohibited businesses presenting adult entertainment. These cases are traditionally analyzed under to the First Amendment to the United States Constitution guaranteeing freedom of speech and the Washington State Constitution, Article 1, Section 5, that provides:

> Every person may freely speak, write and publish, on all subjects, being responsible for the abuse of that right.

Generally, the courts have held that nude and semi-nude dancing comes under the protection of the First and Fourteenth Amendments of the United States Constitution. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 73n.1, (1976); *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 140 (1986). The courts have also held, however, that although the First Amendment protects the communication and expression of a nude dancer, public nudity itself is conduct subject to regulation. *Kitsap County v. Kev, Inc.*, 106 Wn.2d at 140. The State Supreme Court has declared that the Washington State Constitution also protects nude expression, but not nude conduct. *Seattle v. Buchanan*, 90 Wn.2d 584 (1978). Any ordinance regulating the communication and expression by nude or semi-nude dancers, then, must be examined in light of the guarantees of freedom of speech under the Washington Constitution and the First and Fourteenth Amendments to the United States Constitution.

Total bans on nude dancing have been invalidated. *BSA, Inc. v. King County*, 804 Fed.2d 1104 (9th Cir., 1986). The courts have found, however, that a municipality may pass regulations on protected expression if the regulations are time, place, and manner restrictions. Those restrictions must be 1) content neutral, 2) narrowly tailored to serve a compelling state interest, and 3) leave open ample alternative channels of communication. *Bering v. Share*, 106 Wn.2d 212 (1986), cert. dismissed, 93 L.Ed.2d 990 (1987); *O'Day v. King County*, 109 Wn.2d at 796, 808 (1988). The courts have found that pure conduct and obscene expressions do not enjoy the protections of either Article 1, Section 5, or the First Amendment. *Seattle v. Buchanan*, 90 Wn.2d 584 (1978), *O'Day v. King County, supra.*

In adopting regulations that constitutionally limit the protected expressions through time, place and manner restrictions, the United States Supreme Court has held that a city may pass such regulations if there are specific adverse impacts on the city from the operation of the particular business being regulated. The city's concerns must focus on the adverse secondary effects of such a business and not with the content of the expressions of the entertainers themselves. *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986). In determining specific adverse impacts, the city may rely on experiences of other municipalities in similar situations. *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925 at 931. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is

reasonably believed to be relevant to the problem that the city addresses." 106 S.Ct. at 931.

Other municipalities have dealt with adult entertainment businesses and their specific adverse impacts, be they adult book stores, adult motion picture theaters, or adult entertainment establishments with nude or semi-nude entertainers. In *North End Cinema, Inc. v. Seattle*, 90 Wn.2d 709 (1978), the court cited the City of Seattle's experiences with problems related to adult movie theaters in residential areas of the City. The City of Renton had before it the effects of the presence of such theaters when it enacted an ordinance establishing a method of adult theater zoning. *City of Renton v. Playtime Theaters, Inc.*, 106 S.Ct. 925 (1986).

Kitsap County adopted an ordinance regulating erotic dance studios. The County experienced problems with numerous violations of the dancing distance and touching regulations, unlicensed dancers, dancers soliciting tips, and violations of criminal laws regarding controlled substances, prostitution, and other criminal activity. Ultimately, the County declared the business to be a public nuisance and, after substantial litigation, was successful in enjoining certain individuals from operating such a business in the County. *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135 (1986).

The constitutionality of a King County ordinance regulating the operation of nonalcohol topless dancing establishments was challenged. It was upheld as constitutional in *County of King v. Chisman*, 33 Wn.App. 809 (1983). In its decision, the court recited the violations of the ordinance. The owner was operating without a license; he allowed

table dancing which violated the requirement that dancers be no less than six feet away from the patrons; and he allowed people under 21 years of age into the establishment.

The courts have also routinely found that a municipality may regulate obscene activities. The United States Supreme Court established a three-prong obscenity test in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973).

A. Whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ;

B. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

C. Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific values.

The courts have held that incorporation of the *Miller* definition of obscenity into a local ordinance as further defined by the community standards meets the constitutional standards necessary for regulation of such behavior. *State v. Regan*, 97 Wn.2d 47, 50 (1982); *O'Day v. King County*, 109 Wn.2d 796, 807 (1988).

PROPOSED ORDINANCE – BACKGROUND

Presented to the Council is an ordinance establishing of regulatory standards for businesses, managers, and employees that provide adult entertainment in the City of

Kent. In its deliberations on the proposed ordinance, the Council is asked to consider certain information.

In 1982, the Council reviewed an adult use zoning study that detailed, among other things, the impacts of adult uses in the City of Kent including the incidence of crime, impacts on property values, land use incompatibilities, and the major cases and legal guidelines in adult use law. In 1986, the Council adopted Ordinance No. 2687 establishing zoning requirements for location of adult book stores and adult motion picture theaters. An ordinance regulating acts or conduct on premises licensed under the authority of the Washington State Liquor Control Board was adopted by the Council in September, 1981. This was a result of the experience of the City related to a nude dancing establishment that served liquor that was located within the City of Kent. Ordinance No. 2312 prohibits certain obscene nude or semi-nude entertainment or pure conduct in establishments serving liquor. Specific information will be presented to the Council on criminal activity resulting from a particular business of this type in the City of Kent.

At the Council meeting on May 3, 1988 numerous community individuals presented information to the Council on the adverse secondary impacts that result from the location of a nonalcohol topless dancing establishment that was proposed to be located in the City of Kent. Community members mentioned, among other things, the following concerns:

1. Increased impact on a community already impacted by pollution of the Midway Landfill.

2. Negative impact on the business community.

3. Negative impact due to the close proximity to residential areas.

4. Negative modeling for the children.

5. Alcohol consumption by underaged children.

6. Increased illegal activity related to controlled substances.

7. Various liquor law violations.

8. Need for substantial increase in police presence.

9. Increased traffic congestion.

10. Increased robberies and burglaries.

The ordinance presented to the Council is substantially similar to a King County ordinance. The County's ordinance withstood the scrutiny of the Washington State Supreme Court. In *O'Day v. King County*, 109 Wn.2d 796 (1988), the State Supreme Court declared that the King County ordinance regulating adult entertainment establishments that do not serve alcohol was constitutional. Basically, that ordinance requires business owners, managers and entertainers working at any public place of amusement offering nude or semi-nude entertainment to obtain a license, makes those individuals responsible for violating certain standards of conduct, and subjects the violators to criminal penalties and to license revocation or suspension. The Court in *O'Day* stated that nude and semi-nude dancing establishments cannot be outright prohibited but can be regulated through reasonable time, place and manner restrictions.

PROPOSED ORDINANCE – SUMMARY

This ordinance regulates adult entertainment by requiring the business owner, managers of the business, and employees to obtain a license in businesses where adult entertainment will be provided and where alcohol is not served. The ordinance sets out certain standards of conduct. It prohibits employees or entertainers, whether clothed or unclothed, on or off a stage, from certain sexual acts or the imitation of such, from touching certain body parts, and from displaying certain body parts. Some exceptions are applied to these standards:

1. The display of certain body parts can occur when the individual is on a stage that is 18 inches off the floor and 6 feet from the nearest patron.
2. Certain constitutionally protected expressions must be allowed:
    A. Non-obscene dramatic works; or
    B. Activities that are for a scientific or educational purpose; or
    C. Non-obscene expressions or dance.

Business owners are required to obtain a license which will not be issued until the application is reviewed by all appropriate departments of the City and all required information is provided. Managers and entertainers must have a license before working for the establishment.

Admission to the establishment is limited to those individuals 18 years of age or older. no entertainer may be younger than 18 years of age. A licensed manager must be on the premises at all times that the entertainment is occurring.

Substantial penalties are available through this ordinance. The licenses may be revoked or suspended for violations of any provision of the ordinance. In addition, the business may be declared a public nuisance if the ordinance or any law of the City or State of Washington is violated. Upon conviction of a violation of this ordinance, a person may be punished by a fine not to exceed $5,000 or imprisonment for a period not to exceed 12 months or by both such fine or imprisonment. The City may also seek other legal relief that may be available to it to enjoin any practices that would be a violation of this business license ordinance.

cc: Brent McFall, City Administrator

ORDINANCE NO. 2778

AN ORDINANCE of the City of Kent, Washington, regarding the establishment of regulatory standards for businesses, managers, and employees that provide adult entertainment in the City of Kent.

WHEREAS, cities have the right to enact laws for the protection of the public health, safety and general welfare; and

WHEREAS, various Washington State municipalities have found it is necessary for the public health, safety, and welfare to regulate businesses, managers, and employees that provide adult entertainment; and

WHEREAS, the City Council has adopted ordinances relating to adult businesses and adult entertainment that

regulate adult book stores and adult motion picture theatres, massage parlors and massagists, and adult entertainment in businesses licensed by the Washington Liquor Control Board in order to protect the public health, safety, and general welfare of the City as well as to protect and preserve the quality of the City's neighborhoods, commercial districts, and the quality of urban life; and

WHEREAS, the City Council has determined that adult entertainment, including nude and semi-nude dancing, in public establishments is frequently linked to patron, employee, and owner participation in criminal activity including controlled substance violations, liquor law violations, prostitution, and generally, increased criminal activity; and

WHEREAS, the City takes notice of experiences of other cities and counties in combating the specific adverse impacts of businesses providing adult entertainment including nude and semi-nude dancing; and

WHEREAS, the City has conducted a study of the impacts of adult entertainment places and adult uses in its city in a report entitled "City of Kent – Adult Use Zoning Study" issued by the Kent Planning Department in November, 1982, which is incorporated herein by this reference; and

WHEREAS, the City has closed two adult use businesses due to violations of business licenses and/or criminal activity as is set forth in the above-referenced study; and

WHEREAS, certain testimony has been presented to the City Council and its committees through verbal and written statements concerning the adverse secondary impacts of businesses providing adult entertainment; NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF KENT, WASHINGTON DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. A new ordinance regulating businesses, managers and employees that provide adult entertainment is adopted as follows:

5.32.010. FINDINGS OF FACT. Based on public testimony and other evidence and information before it, the Kent City Council makes the following Findings of Fact:

A. The activities defined and regulated hereinafter are detrimental to the public health, safety, and general welfare of the citizens of the City and, therefore, such activities must be regulated as provided herein.

B. Regulation of the adult entertainment industry is necessary because in the absence of such regulation significant criminal activity has historically and regularly occurred. This history of criminal activity in the adult entertainment industry has included prostitution, narcotics and liquor law violations, breaches of the peace and the presence within the industry of individuals with hidden ownership interests and outstanding arrest warrants.

C. In the absence of regulation, the activities described above occur regardless of whether the adult entertainment is presented in conjunction with the sale of alcoholic beverages.

D. It is necessary to license entertainers in the adult entertainment industry to prevent the exploitation of minors; to ensure that each such entertainer is an adult; to ensure that such entertainers have not assumed a false name, which would make regulation of the entertainer difficult or impossible; and to ensure that such entertainers are not involved in criminal activity.

E. It is necessary to have a licensed manager on the premises of establishments offering adult entertainment at such times as such establishments are offering adult entertainment so that there will at all necessary times be an individual responsible for the overall operation of the establishment, including the actions of patrons, entertainers and other employees.

F. The license fees required herein are nominal fees imposed as necessary regulatory measures designed to help defray the substantial expenses incurred by the City in regulating the adult entertainment industry.

G. Hidden ownership interests for the purposes of skimming profits and avoiding the payment of taxes have historically occurred in the adult entertainment industry in the absence of regulation. These hidden ownership interests have historically been held by organized and white collar crime elements. In order for the City to effectively protect the public health, safety, and general welfare of its citizenry, it is important that the City be fully apprised of the actual ownership of adult entertainment establishments.

5.32.020. DEFINITIONS. For the purpose of this chapter the words and phrases used herein, unless the

context otherwise indicates, shall have the following meanings:

A. "Public place of amusement," "public amusement/entertainment," and "public entertainment" mean an amusement, diversion, entertainment, show, performance, exhibition, display or like activity, for the use or benefit of a member or members of the public, or advertised for the use or benefit of a member of the public, held, conducted, operated or maintained for a profit, either direct or indirect.

B. "Manager" means any person appointed by the operation who manages, directs, administers, or is in charge of, the affairs and/or the conduct of any portion of any activity involving adult entertainment occurring at any place offering adult entertainment.

C. "Entertainer" means any person who provides adult entertainment within a public place of amusement as defined in this section whether or not a fee is charged or accepted for such entertainment.

D. "Entertainment" means any exhibition or dance of any type, pantomime, modeling or any other performance.

E. "Adult entertainment" means any exhibition or dance of any type conducted in premises where such exhibition or dance involves a person that is unclothed or in such attire, costume or clothing as to expose to view any portion of the breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals.

F. "Employee" means any and all persons, including entertainers and independent contractors, who work in or at or render any services directly related to the operation of a public place of amusement, which offers, conducts or maintains adult entertainment.

G. "Operator" means any person operating, conducting or maintaining an adult entertainment business.

5.32.030. LICENSE FOR BUSINESS REQUIRED – FEE.

A. No public place of amusement, including but not limited to places which offer adult entertainment, shall be operated or maintained in the City of Kent unless the owner or lessee thereof has obtained a license from the City Clerk; Provided, however, that it is unlawful for any entertainer, employee or operator to knowingly work in or about, or to knowingly perform any service directly related to the operation of an unlicensed public place of amusement/entertainment.

B. The annual fee for such a license shall be $500.00.

C. This license expires annually on December 31 and must be renewed by January 1.

D. There will be no prorating of the fee.

E. The applicant must be 18 years of age or older.

5.32.040. LICENSE FOR MANAGERS AND ENTERTAINERS REQUIRED – FEE.

A. No person shall work as a manager or entertainer at a public place of amusement offering adult entertainment without having first obtained a manager's

or an entertainer's license from the City Clerk pursuant to section 5.32.070 of this chapter.

B. The annual fee for such a license shall be $150.00.

C. This license expires annually on December 31 and must be renewed by January 1.

D. There will be no prorating of the fee.

E. The applicant must be 18 years of age or older.

5.32.050. DUE DATE FOR LICENSE FEES. All licenses required by 5.32.030 must be issued and the applicable fees are due and payable to the City Clerk at least fourteen (14) calendar days before the opening of the adult entertainment business.

5.32.060. RENEWAL OF LICENSE, REGISTRATION OR PERMIT – LATE PENALTY. A late penalty shall be charged on all applications for renewal of a license, received later than ten (10) calendar days after the expiration date of such license. The amount of such penalty is fixed as follows:

A. For a license, requiring a fee of fifty cents or more, but less than or equal to seventy-five dollars, twenty percent of the required fee:

B. For a license, requiring a fee of more than seventy-five dollars, ten percent of the required fee.

5.32.070. LICENSE APPLICATIONS.

A. *Public Adult/Entertainment License.* All applications for a public amusement/entertainment license for places which offer adult entertainment shall be submitted in the name of the person or entity proposing to conduct

such public amusement/entertainment on the business premises and shall be signed by such person and notarized or certified as true under penalty of perjury. All applications shall be submitted on a form supplied by the City Clerk, which shall require the following information:

1. The name, home address, home telephone number, date and place of birth, driver's license number, if any, and social security number of the applicant if the applicant is an individual.

2. The business name, address and telephone number of the establishment.

3. The names, addresses, telephone numbers, and social security numbers of any partners, including limited partners, corporate officers, shareholders who own ten percent or more of the business, or other persons who have a substantial interest or management responsibilities in connection with the business, specifying the interest or management responsibility of each. For the purpose of this subsection "substantial interest" shall mean ownership of ten percent or more of the business, or any other kind of contribution to the business of the same or greater size.

4. Terms of any loans, leases, secured transactions and repayments therefore relating to the business.

5. Addresses of the applicant for the five (5) years immediately prior to the date of application.

6. A description of the adult entertainment or similar business history of the applicant; whether such person or entity, in previously operating in this or another city, county or state, has had a business license

revoked or suspended, the reason therefore, and the activity or occupation subsequent to such action, suspension or revocation.

7. Any and all criminal convictions or forfeitures other than parking offenses or minor traffic violations including dates of conviction, nature of the crime, name and location of court and disposition for each owner, partner or corporation.

8. A description of the business, occupation, or employment of the applicant for the three (3) years immediately preceding the date of application.

9. Authorization of the City, its agents and employees to seek information to confirm any statements set forth in the application.

10. Supplemental identification and/or information necessary to confirm matters set forth in the application.

B. *Manager or Entertainer License.* A separate license shall be obtained for each and every establishment at which the applicant will practice. All applications for a manager's or entertainer's license shall be signed by the applicant and notarized or certified to be true under penalty of perjury. All applications shall be submitted on a form supplied by the City Clerk, which shall require the following information:

1. The applicant's name, home address, home telephone number, date and place of birth, fingerprints taken by the Kent Police Department employees, social security number, and any stage names or nicknames used in entertaining.

2. The name and address of each business at which the applicant intends to work.

3. The applicant shall present documentation that he or she has attained the age of eighteen (18) years. Any of the following shall be accepted as documentation of age:

(i) a motor vehicle operator's license issued by any state bearing the applicant's photograph and date of birth, or

(ii) a state issued identification card bearing the applicant's photograph and date of birth.

4. A complete statement of all convictions of the applicant for any misdemeanor or felony violations in this or any other city, county, or state except parking violations or minor traffic infractions.

5. A description of the applicant's principal activities or service to be rendered.

6. Resident addresses and telephone numbers for five (5) years immediately prior to the date of application specifying the period of residence at each address.

7. The name and address of employers or individuals or businesses for whom the applicant was an employee or independent contractor for the three (3) year period immediately prior to the date of application, including the period of employment.

8. Supplemental information and/or identification deemed necessary by the Clerk or her or his designee to confirm any statements set forth in the application.

9. Authorization for the City, its agents and employees to investigate and confirm any statements set forth in the application.

C. If any person or entity acquires, subsequent to the issuance of a public amusement/entertainment license for places offering adult entertainment, a substantial interest in the licensed premises, immediate notice of such acquisition shall be provided in writing to the City Clerk, and in no event, no later than twenty-one (21) days following such acquisition. The information required to be provided pursuant to this subsection shall be that information required pursuant to subsection 5.32.070 of this chapter.

D. Copies of an application shall, within five (5) calendar days of receipt thereof, be referred by the City Clerk to the Planning, Building, Fire or other appropriate Departments. The departments shall, within thirty (30) business days, inspect the application, the premises proposed to be operated as an adult entertainment place and shall make written verification to the City Clerk that such premises complies with the codes of the City. No license may be issued without such verification. The application shall also be referred to the Police Department for a criminal records check and verification of the information provided by the applicant on the application for a license.

E. Upon completion of the investigation and review by the departments, a review of the recommendations and verifications, and a determination that all matters contained in the application are true and correct and that this chapter has been complied with, the City Clerk shall issue such license applied for in accordance with the

provisions with this chapter; provided, however, that the applicable license fee, together with any delinquent fees that may then be due shall first be paid to the City.

5.32.080. MANAGER ON PREMISES. A licensed manager shall be on the premises of a public place of amusement at all times that adult entertainment is being provided.

5.32.090. LICENSE NONTRANSFERABLE. No license or permit shall be transferable.

5.32.100. LICENSE – POSTING AND DISPLAY.

A. Every adult entertainer shall post his or her permit in his or her work area so it is readily available for public inspection.

B. Every person, corporation, partnership, or association licensed under this Chapter shall display such license in a prominent place. The name of the manager on duty shall be prominently posted during business hours.

5.32.120. LICENSE – NAME OF BUSINESS AND PLACE OF BUSINESS. No person granted a license pursuant to this Chapter shall operate the adult entertainment business under a name not specified in his/her license, nor shall he/she conduct business under any designation or location not specified in his/her license.

5.32.130. ADULT ENTERTAINMENT. Any license issued for an adult entertainment business may be revoked or suspended by the City Council after notice of not less than ten (10) calendar days, and a subsequent hearing for good cause, or in any case where any of the provisions of this Chapter are violated, or where any employee of the licensee is engaged in any conduct which

violates any state or local laws or ordinances at licensee's place of business and of which the licensee has actual or constructive knowledge. Such permit may also be revoked or suspended by the City Council after notice and hearing, upon the recommendations of the County Health Department that such business is being managed, conducted, or maintained without regard to proper sanitation and hygiene.

5.32.140. PERMIT – REVOCATION OR SUSPENSION. An adult entertainment manager or entertainer permit issued by the City Clerk shall be revoked or suspended where it appears that the operator has made a false statement on an application for a permit, or has committed an act in violation of this Chapter.

5.32.150. LICENSE – SALE, TRANSFER, OR RELOCATION. Upon sale, transfer or relocation of an adult entertainment business, the license therefor shall be null and void; Provided, however, that upon the death or incapacity of the licensee or any colicensee, any heir or devisee of a deceased licensee, or any guardian of an heir or devisee of a deceased licensee may continue the adult entertainment for a reasonable period of time not to exceed sixty (60) calendar days to allow for an orderly renewal of the license, if such new licensee fulfills all requirements of this Chapter.

5.32.160. STANDARDS OF CONDUCT AND OPERATION.

A. The following standards of conduct must be adhered to by employees of any public place of amusement which offers, conducts, or maintains adult entertainment:

1. No employee or entertainer shall be unclothed or in such less than opaque and complete attire, costume or clothing so as to expose to view any portion of the breast below the top of the areola or of any portion of the pubic region, anus, buttocks, vulva or genitals except as provided for in subdivision 6 of this subsection and section 5.32.160.C.3 of this chapter.

2. No employee or entertainer mingling with the patrons shall be unclothed or in such attire, costume or clothing as described in subdivision 1. of this subsection.

3. No employee or entertainer shall encourage or knowingly permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

4. No employee or entertainer shall wear or use any device or covering exposed to view which simulates the breast below the top of the areola, vulva or genitals, anus, buttocks, or any portion of the pubic region.

5. No employee or entertainer shall perform acts of or acts which simulate:

a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law;

b. The touching, caressing or fondling of the breast, buttocks or genitals; or

c. The displaying of the pubic region, anus, vulva or genitals; except as provided for in subdivision 6 of this subsection and section 5.32.160.C.3 of this chapter.

6. No employee or entertainer shall be unclothed or in such less than opaque and complete attire, costume or clothing so as to expose to view any portion of the breast below the top of the areola, or any portion of the pubic region, vulva or genitals, anus and/or buttocks exposed to view except upon a stage at least eighteen inches above the immediate floor level and removed at least six feet from the nearest patron.

7. No employee or entertainer shall use artificial devices or inanimate objects to depict any of the prohibited activities described in this subsection.

a. No employee or entertainer shall remain in or upon the public place of amusement who exposes to public view any portion of his or her genitals or anus except as expressly provided for in subdivision 6 of this subsection and section 5.32.160.C.3 of this chapter.

8. No entertainer of any place offering adult entertainment shall be visible from any public place during the hours of his or her employment, or apparent hours of his or her employment, on the premises.

9. No entertainer at a place offering adult entertainment shall demand or collect all or any portion of a fee from a patron for entertainment before its completion.

10. A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

THIS ADULT ENTERTAINMENT ESTABLISHMENT IS REGULATED BY THE CITY OF KENT; ENTERTAINERS ARE:

a. Not permitted to engage in any type of sexual conduct;

b. Not permitted to be unclothed or in such less than opaque and complete attire, costume or clothing so as to expose to view any portion of the breasts below the top of the areola, any portion of the pubic region, buttocks, genitals or vulva and/or anus except upon a stage at least eighteen inches from the immediate floor level and removed at least six feet from the nearest patron; and

c. Not permitted to demand or collect all or any portion of a fee from a patron for entertainment before its completion.

B. At any public place of amusement which offers, conducts, or maintains adult entertainment, the following are required:

1. Admission must be restricted to persons of the age of eighteen years or more; and

2. Neither the performance nor any photograph, drawing, sketch or other pictorial or graphic representation thereof displaying any portion of the breasts below the top of the areola or any portion of the pubic hair, buttocks, genitals and/or anus may be visible outside of the public place of amusement so licensed.

3. Sufficient lighting shall be provided in and about the parts of the premises which are open to and used by the public so that all objects are plainly visible at all times.

C. This chapter shall not be construed to prohibit:

1. Plays, operas, musicals, or other dramatic works which are not obscene;

2. Classes, seminars and lectures held for serious scientific or educational purposes; or

3. Exhibitions or dances which are not obscene.

D. For purposes of this chapter, an activity is "obscene" if:

1. Taken as a whole by an average person applying contemporary community standards the activity appeals to a prurient interest in sex;

2. The activity depicts patently offensive representations according to Kent community standards of

a. ultimate sexual acts, normal or perverted, actual or simulated; or

b. masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

3. The activity taken as a whole lacks serious literary, artistic, political, or scientific value.

E. For purposes of this chapter, an activity is "dramatic" if the activity is of, relating to, devoted to, or concerned specifically or professionally with current drama or the contemporary theater.

F. Section 5.32.160 of this chapter does not apply to taverns and premises maintaining liquor licenses. City of Kent Ordinance 2312 does so apply.

5.32.170. BUSINESS HOURS. No public entertainment shall be conducted between the hours of two-thirty a.m. and ten a.m.

5.32.180. PUBLIC NUISANCE. Any adult entertainment business operated, conducted or maintained contrary to the provisions of this Chapter or any law of the City or State of Washington shall be, and the same is, declared to be unlawful and a public nuisance and the City Attorney may, in addition to or in lieu of prosecuting a criminal action hereunder, commence an action or actions, for the abatement, removal and enjoinment thereof, in the manner provided by law; and shall take such other steps and shall apply to such court or courts as may have jurisdiction to grant such reliefs as will abate or remove such adult entertainment business, and restrain and enjoin any person from operating, conducting or maintaining an adult entertainment business contrary to the provisions of this Chapter.

5.32.190. VIOLATION – PENALTY. Every person, except those persons who are specifically exempted by this Chapter, whether acting as an individual owner, operator, employee, or agent or independent contractor for the owner, employee or operator, or acting as a participant or worker in any way directly or indirectly who works in or operates an adult entertainment business, of any of the services defined in this Chapter without first obtaining a license or permit, and paying a fee to do so, from the City, or violates any provisions of this Chapter

shall be guilty of a misdemeanor. Upon conviction such person shall be punished by a fine not to exceed five thousand dollars, or by imprisonment for a period not to exceed twelve months, or by both such fine and imprisonment.

5.32.200. ADDITIONAL ENFORCEMENT. Notwithstanding the existence or use of any other remedy, the City may seek legal or equitable relief to enjoin any acts or practices which constitute or will constitute a violation of any business license ordinance or other regulations herein adopted.

5.32.210. SEVERABILITY. If any section, sentence, clause or phrase of this chapter should be held invalid or unconstitutional, the validity or constitutionality thereof shall not affect the validity or constitutionality of any other section, sentence, clause, or phrase of this chapter.

Section 2. Any act consistent with the authority and prior to the effective date of this ordinance is hereby ratified and confirmed.

Section 3. Effective Date. This ordinance shall take effect and be in force five (5) days from and after its passage, approval and publication as provided by law.

/s/ Dan Kelleher
DAN KELLEHER, MAYOR

ATTEST:

/s/ Marie Jensen
MARIE JENSEN, CITY CLERK

APPROVED AS TO FORM:

/s/ Sandra Driscoll
SANDRA DRISCOLL, CITY ATTORNEY

PASSED the 17 day of May, 1988.

APPROVED the 19 day of May, 1988.

PUBLISHED the 20 day of May, 1988.

I hereby certify that this is a true copy of Ordinance No. 2778, passed by the City Council of the City of Kent, Washington, and approved by the Mayor of the City of Kent as hereon indicated.

/s/ Marie Jensen (SEAL)
MARIE JENSEN, CITY CLERK

EXHIBIT D

The Hon. Thomas Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK COLACURCIO, JR., DAVID EBERT, and STEVE FUESTON dba DDF&S INVESTMENT COMPANY, Plaintiffs, v. THE CITY OF KENT, Defendant.	NO. C94-256Z AGREED ORDER ~~PROPOSED~~

This matter came before the Court August 11, 1994, for argument on the Plaintiff's motion for partial summary judgment and the City of Kent's Motion for Summary Judgement [sic]. The Court heard the oral argument of counsel for the Plaintiffs, Gilbert H. Levy, and counsel for the City of Kent, Laurie Evezich. All materials filed in support of or opposition to the respective motions have been fully considered. In addition, by presenting this agreed order, the parties have indicated their desire to enter into a final settlement which they wish to have incorporated into the terms of this order.

Pursuant to Federal Rule of Civil Procedure 56 and based on the arguments of counsel and the evidence presented, the Court finds that the following material facts are not at issue and that the City of Kent is entitled to judgment on the following issues as a matter of law:

Kent City Code §15.08.270 is a content-neutral, time, place, and manner regulation that serves a substantial government interest. However, the Court finds that as applied, KCC §15.08.270 does not provide Plaintiffs with reasonable alternative avenues of communication; therefore, no genuine issue of material facts exists on the issue of reasonable alternative avenues of communication and the Plaintiffs are entitled to judgment on this issue as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The motion of Plaintiffs, Frank Colacurcio, Jr., David Ebert and Steve Fueston dba DDF&S Investment Co., for partial summary judgment is granted in part, and the motion of Defendant City of Kent for summary judgment is granted in part.

2. The Defendant is preliminarily enjoined from enforcing KCC §15.08.270 against the Plaintiffs at ~~21236~~ [21445] 84th [62] Avenue S.~~E.~~, Kent, Washington ("the site"). [/s/ LAE Legal Description Attached] The preliminary injunction shall remain in effect until the Plaintiffs have obtained a building permit and certificate of occupancy for the development and use of the site which the Plaintiff must pursue with due diligence and in accordance with all other applicable city code provisions. At said time as the Plaintiffs file a completed building permit application, Plaintiffs' proposed use shall be treated as a legal nonconforming use in the event of zoning changes which impact Plaintiffs' business as a permitted use. The Plaintiffs' proposed use shall not be deemed to be in noncompliance with the provisions of KCC 15.08.270 at

the proposed site for the purposes of the adult entertainment licensing provisions of KCC 5.11.070(D).

3. The Defendants shall promptly and in good faith review and process all applications for permits and perform all inspections that are necessary for the development of the site with good faith, fair dealing, and reasonable promptness in accordance with the laws of the State of Washington. Upon Plaintiffs' compliance with all applicable code requirements, the Defendant shall promptly and in good faith grant approval of such permit applications and corresponding certificate of occupancy.

4. The Defendants shall not unlawfully discriminate against the Plaintiffs on the basis of their proposed use of the site during the building permit process or any inspections required for the issuance of a certificate of occupancy.

5. Judgment shall be entered in favor of the Plaintiffs on the issue of the City's failure to provide the Plaintiffs with reasonable alternative avenues of communication. Upon the parties' compliance with the terms set forth in paragraph 3, the Plaintiffs' claim for any damages, costs and attorney fees arising out of or in connection with the facts and circumstances set forth in U.S. District Court Cause No. C94-256Z, including all related state law claims, shall be dismissed with prejudice. Provided, however, that the Plaintiffs may not challenge dismissal of the damage claim if, after a reasonable period of time during which compliance would normally be expected, they have failed without good cause to comply with applicable building, fire, safety, health and

environmental codes, which the Defendants have administered promptly and in good faith as set forth in paragraph 3, above.

6. The Court shall retain jurisdiction over this matter insofar as it may be required to insure compliance of the parties with its terms; or, so as to grant further relief or modification as may be required to effectuate the ruling herein.

7. Upon satisfaction of the conditions set forth in paragraph 3 above, the parties shall present an agreed order dismissing the plaintiffs' claims for damages, and all other unadjudicated claims, consistent with the terms of this order. In the interim, all unadjudicated matters, in this lawsuit shall be stayed.

DATED this 25th day of August, 1994.

/s/ Thomas S. Zilly
JUDGE

Copy received, agreed for entry,
notice of presentation waived:

CITY OF KENT

/s/ Laurie Evezich
LAURIE EVEZICH
ASSISTANT CITY ATTORNEY
ATTORNEYS FOR DEFENDANT
CITY OF KENT
WSBA #20990
220 Fourth Ave. S.
Kent, Washington 98032
206/859-3340

/s/ Gilbert H. Levy
GILBERT H. LEVY
ATTORNEY FOR PLAINTIFFS
WSBA #4805
Suite 200, Market Place Two
2001 Western Avenue
Seattle, Washington 98121
206/443-0670

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK COLACURCIO, JR., et al., Plaintiffs,	)	
vs.	)	Case C94-256Z
THE CITY OF KENT, Defendant.	)	COPY

RULING ON MOTIONS

on August 11, 1994, by the Honorable Thomas S. Zilly, United States District Judge, at the United States Courthouse, Seattle, Washington.

Appearances of Counsel:

On Behalf of Plaintiffs: GILBERT LEVY
Attorney at Law

On Behalf of Defendant: LAURIE EVEZICH
Assistant City Attorney
City of Kent
MIKE WALTER
Attorney at Law

Sue Palmerton
Official Court Reporter
(206) 553-1899

[p. 2] Seattle, Washington; Friday, August 11, 1994

THE COURT: This matter comes before the Court on the plaintiffs' motion for partial summary judgment and the City's cross motion for summary judgment. Plaintiff in this case challenges the constitutionality of the City of Kent's zoning ordinance which regulates the location of adult businesses.

The City of Kent has adopted an ordinance which prohibits adult uses within a thousand feet of any residential zone, or single or multiple-family residential use, school, church or other religious facility, and within a thousand feet of other businesses or entities not at issue here. At issue here is whether the residential use setback requirement of the Kent City Code, which is specifically found in the City of Kent Code at Section 15.08.200A1, is constitutional.

Now, the parties have given me a great deal of factual background. I am not going to try and outline it all at this time. But basically back in 1982, the City of Kent Planning Department published a study pertaining to

adult use businesses. And they went through a rather exhaustive process of studying the issue, reviewing the *City of Renton v. Playtime Theatres* case which was ultimately decided in 1986. And ultimately, after fairly exhaustive consideration, the City of Kent adopted the ordinance which is now being challenged here.

The plaintiffs in this case seek to locate a business site for an adult nightclub in the city of Kent which would serve [p. 3] nonalcoholic beverages and feature nude or semi-nude or erotic entertainment.

In October of 1993, the plaintiffs' representatives located a parcel which they felt would satisfy the zoning requirements of the City of Kent. That site is located at 21236 84th Avenue Southeast. And a letter was directed to the City asking whether that site would meet the requirements of the setback restrictionscontained [sic] in the Code at Section 15.08.270. Although plaintiffs were originally told that it would, in fact, meet the setback requirements, they were later told by the City, and the plaintiffs verified, that the setback requirements would be violated because there was a residential use within 1,000 feet.

The parties have each used experts and filed declarations with the Court to try to outline and designate how many sites they believe are applicable here. But the bottom line is that the plaintiff now contends only one site is available in the entire city of Kent. And the City contends as outlined by the brief, which clearly states in the defendant's amended memorandum of points and authorities at page 8 that it, the City, has determined that there are

"seven possible sites that an adult use business might locate within the total available acreage of 14.15 acres."

They refer me to exhibits D, D-1, D-2 and exhibit E, which are not themselves completely self-explanatory in determining how we get the seven sites. But for purposes of this motion, it is [p. 4] undisputed that, giving the City the benefit of the doubt, there are seven sites consisting of approximately 14.15 acres, which would constitute something less than 1.5 percent of the total acreage of the city of Kent that might be available.

Nude dancing is a form of expressive conduct which has marginal First Amendment protection and can be regulated by the state or city as long as it's not banned altogether or effectively zoned out, *Young v. American Mini Theaters,* 427 U.S. 50 (1976).

The leading case, of course, on this whole issue which has been a problem for the participants as well as the courts is *Renton v. Playtime Theatres, Inc.* involving the City of Renton ordinance which referred to 1,000 feet of any residential zone. The majority held the ordinance was a valid government response to serious problems created by adult theaters and satisfied the dictates of the First Amendment.

The *Renton* court noted and relied principally on the *Young v. American Mini Theaters* case to conclude that regulations enacted for the purpose of restraining speech would be presumptively in violation of the First Amendment, while content neutral regulations would be governed by a time, place and manner regulation and would be acceptable as long as they would be designated to serve a substantial governmental interest and they did

not unreasonably limit alternative avenues of communication. That seems to be the test that the Court must apply in this [p. 5] case.

Now, the Court has reviewed carefully the various declarations, including the declaration of Mr. James P. Harris, the planning director for the City of Kent. And he states that, in his opinion, the M1-C zone, which is found in Section 15.04.170 and specifically at part B, would allow adult entertainment as proposed here. Then he qualifies it by saying, "if they were attached to or a part of principally permitted uses within the M1-C district." He then goes on to indicate that, for example, an adult entertainment facility and restaurant would qualify.

Although the Court had some question about it, I am satisfied with the City's broader interpretation that any use in M1 or M1-C would be a principal use which could be used for purposes of permitting the plaintiffs' proposed use to be an accessory use. Clearly, I believe that the principal uses outlined in the City Code at 15.04.170 either for a M1 district or a M1-C district would not themselves be a permitted principal use for this type of adult entertainment.

So, the plaintiff has the burden then to make as an accessory use or structure something that would be incidental, subordinate to the principal use or structure and they are, of course, outlined in the City Code.

It seems to the Court that, based on the *Renton* case and the case involving the City of Detroit which is the *Young* case, *Young* [p. 6] *v. American Mini Theaters*, that there are a number of findings and conclusions that the Court can reach based on the facts here. I therefore find

and conclude that there are no material facts which would preclude partial summary judgment in this case.

I also conclude that the City of Kent's ordinances at issue here are content neutral, and time, place and manner regulation is therefore appropriate if it serves a substantial governmental interest and allows for reasonable alternative avenues of communication, *Renton v. Playtime Theatres,* 475 U.S. 41 (1986).

I further find that the Kent ordinance serves a substantial governmental interest in attempting to preserve the quality of urban life, *Young v. American Mini Theaters, Inc.,* 427 U.S. 50 (1976). And I refer specifically to the findings which the City made and incorporated in its Code found at 5.11.010. All of the findings there are findings which the City made after careful deliberation and I am satisfied evidence a substantial governmental interest in attempting to preserve the quality of urban life.

The parties dispute, however, whether reasonable alternatives are available. The plaintiffs contend only one site is available. And in this Court's opinion, this clearly would not satisfy the *City of Renton* and *American Mini Theaters* test. *CLR Corporation v. Henline,* 702 F.2d 637, a Sixth Circuit case that found that four sites were inadequate. I am satisfied that one [p. 7] site just doesn't do the job. And although the counsel for the City had a difficult time trying to respond to that, I think it's fairly clear that reasonable alternatives means more than one site.

As I have indicated, the City of Kent relies on the M1-C zone to pick up another six sites, which would result in a total of 14.15 acres out of a total in the city of

Kent of 11,795.2 acres, which would be something less than 1.5 percent.

As I have indicated, Mr. Harris' declaration qualifies even these six sites because he says they would be available or M1-C zone would only be available for adult entertainment uses if they were attached to or part of principally permitted uses within the M1-C district. And he goes on to say, for example, this adult entertainment facility. This means that even the six sites are limited.

In the Court's reading of the Kent ordinance relating to M1-C zoning, I do not believe that any of the principally listed uses would permit the use intended by the plaintiff. I further do not believe that any of the principally permitted uses in either M1 or M1-C would permit as an accessory use or structure being something of a nature customarily incidental and subordinate to the principal use or structure as defined in 15.02.005 the type of use the plaintiff intends here.

Therefore, I conclude as a matter of law that the statute, even giving deference to the City, does not on its face permit [p. 8] the type of use permitted or proposed by the plaintiff in the M1 or M1-C zone of the City's zoning plan.

The Court also concludes that even if these six sites were included, that they are so qualified so as not to allow reasonable alternatives in the collective for the plaintiff. In other words, the one that everyone agrees might be available and these six as qualified by Mr. Harris' declaration do not, in my opinion, as a matter of law provide the reasonable type of alternatives for the plaintiff.

The Court therefore will grant in part the plaintiffs' motion for summary judgment and grant in part the defendant's motion for summary judgment because I have concluded in part as to each.

What I am going to direct the lawyers to do is to prepare a proposed order or judgment consistent with the Court's ruling that would, in effect, conclude that the City has not provided the necessary reasonable alternatives available and required by the *City of Renton v. Playtime Theatres.*

I am not satisfied entirely and I think maybe the lawyers didn't have adequate time to think through exactly how the nature of the relief should be worded. It is my intent to make the relief as narrow as possible and yet provide the plaintiffs with the relief which I think they are entitled to under the law.

So, I am not going to strike down the entire zoning code and I am not entirely sure I am going to strike down the setback requirements, but I am going to provide the plaintiffs with [p. 9] relief. So, I am going to direct the lawyers to try and formulate a proposed judgment or order that would do that.

I am going to ask you to submit that to the Court. If you can reach an agreement on the language, that would be the best of all worlds. If you can, submit that by a week from Friday and indicate to me by some sort of cover that you've reached agreement and both obviously then sign the thing so that I know that each side has agreed.

If you are unable to agree, please submit your proposed version of what the Court's order should say with a memorandum not to exceed five pages which explains how you're different from the other side and why you think your order is sufficient. It is not going to be necessary for this order to outline what I have said on the record today or the reasons, but merely the Court having ruled as I've ruled, this is the relief that would be provided.

If I am not satisfied from the written materials that I can reach a final decision on the nature of the relief, I will ask for you to come back and we will have additional oral argument. If you're either in agreement or I can reach a decision without oral argument, we will enter an order promptly the following week.

Any questions with respect to the Court's ruling?

MR. LEVY: No, Your Honor.

MS. EVEZICH: No, sir.

EXHIBIT E

Operations Committee Minutes Excerpt

– verbatim – February 22, 1995

Johnson: Adult Entertainment Business Licensing Ordinance . . . Roger

Roger Lubovich: As you know, this is a ordinance as a result of the recent litigation we had in federal court regarding an adult entertainment facility going up on 214th & 84th. Just for your information, the Planning Commission is currently reviewing the zoning regulations to comply with the judges order dealing with reasonable number of sites. As a follow up to that we decided to take a look at the licensing regulations we had in place and to make whatever appropriate changes we deemed might be more appropriate. Our zoning code zones not only, you know, like dance studios but also deals with bookstores – adult bookstores, adult theaters. Our current licensing does not deal with those other facilities it only deals with the dance studios so we thought it was appropriate to expand the proposed ordinance to cover not just dance studios but other adult entertainment facilities. Adult arcades, theaters, bookstores, that type of thing, novelty shops. We also wanted to make sure we regulated conduct to the extent we could. One other . . . A couple of things that are really key to this particular ordinance is that it requires, in exotic dance studios, it requires entertainment to be done on stages. That was modeled after a Kitsap County ordinance which was challenged, and taken to . . . in federal court and upheld. It is the same exact requirements, it has to be on a stage, two feet above ground, and no dancing

can be any closer than ten feet to a patron. That was upheld and so we put the same criteria in this particular ordinance it was determined not to be an unreasonable intrusion or interference . . . it was a reasonable time, place, manner regulation of first amendment rights so we wanted to adopt that. The other thing that the Kitsap County ordinance did that we wanted to adopt is the prohibition of money exchanges between a patron and an entertainer. We feel there just a lot of potential for illicit activity: solicitation, drug activity that type of thing with direct contact with entertainers and patrons and the prohibition of money exchanges between them directly would take care of some of those concerns. Uh, we have required a few more things in the application process as I lined out in my memo there's a the [sic] section which has a complete list of things of photographs, fingerprints, that type of thing. Basically, the processing fees, what we put processing fee on all applications. All adult entertainment businesses have I think $150.00 processing fee and entertainers and managers have for exotic dance studios have a $100.00 processing fee. Business licenses, that's on top of the businesses license, the business license for an exotic dance studio is $500.00 and $150.00 for all other types of businesses. We require a manager, a license manager, be on any adult entertainment premises anytime they are open to the public for, you know, their business. Entertainers must have a license but by the same case in Kitsap County we cannot delay issuing an entertainers license so they're giving an immediate temporary license. We have the opportunity to verify, uh, you know, their application and then issue a permanent one shortly thereafter. We do have time to deal with the

owner's license. They are not a [sic] required to issue immediately so we do have more time to deal with them. Um, basically, those are the key issues. We have tried to be very specific in our definitions and the activity involved. Obviously prohibiting sexual activity as defined in the ordinance. Um, and trying to regulate the uh regulated dancing and other types of performances. So, really, I guess that's where we are right now. Um, we have uh, or I guess at this point, I would like to possibly suggest that we actually having [sic] a hearing on this at the Council level. Uh this is a protected activity. I just want a little bit more . . . I want an opportunity I would think. I'm recommending an opportunity for people to testify on the ordinance I think establishing a basis and that our findings coincide with those, with that testimony. I think it would be in our benefit to have an opportunity for testimony. You know you may not want it but I think it would be appropriate to have a actual hearing on it. And, uh, I don't know is there any questions, comments?

Christi Houser: I have a question. Over here where it talks about the licensing for entertainment – adult entertainment – business license are you including the video stores and the novelty stores is this going to impact the stores that are already there like Lover's Package?

Roger Lubovich: They have to have a certain percentage, I think it's 20% or more, of adult entertainment videos and that type of thing in the facility. It wouldn't impact them. My understanding is they, that's our current criteria now. It's not adult entertainment if they maintain within that 20% stock of adult films and that type of thing. That is our current requirement, we just maintain

the same requirement they would not be an adult entertainment businesses to be regulated as long as they stayed within that, that same criteria. (laughter) I know, those are the kinda, we try to keep in the same format as our current, a lot of, basically, this ordinance is taken from our own ordinance, from King County's, from Bellevue's, Kelso's, and Kitsap County's just little pieces of it all over. And, uh, we wanted to maintain some of the, uh, criteria we had in our own. Cuz I didn't want to impact anything that was existing like the Lover's Package and those types of facilities. So, if they maintain the same criteria they do under the current code it shouldn't impact them. If they started showing films or something, that's a whole different story. But if . . .

Brent McFall: Or if there [sic] sales would exceed 20% sales of . . .

Roger Lubovich: . . . stock and trade of adult entertainment material

Brent McFall: . . . if you receive 20% of your business revenue . . . (inaudible)

Roger Lubovich: . . . same thing with a video rental place. Video rental place that has 20% or less of adult films they are not adult business but they have to keep it separated, we do have some regulation requiring that those be a little bit separated and not in with Disney films and stuff. Well I have kids . . . and looking for movies all the time . . . (laughter)

Brent McFall: Several things come to mind but I'm not going to say em.

Jon Johnson: What's the definition for an adult film?

Roger Lubovich: It's displaying basically uh exhibiting the specified sexual activities as defined in the definition section . . . please don't ask me to read them to you. (laughter) The first time I even read our code I blushed I said I don't want to do this. But it's basically . . . uh.

Jon Johnson: As far as the rating of a movie like for example would we consider an R rated movie is an adult movie.

Roger L: No

Jon Johnson: or NC 17 . . .

Roger L: No, films that show specific sexual acts would be categorized as an adult entertainment. Basically, any facility that, you know, like films, like adult arcades and movie theaters that have those type of films would be a regulated business. Uh and then the, for the dancing studios, those kinds of activities obviously are prohibited. Exotic dance studios deal with live performances and that they're in a state of nudity as defined in here which is basically, you know, nude. (laughter) like I said it's an easy way to define it . . .

Christi Houser: Without clothes.

Roger L: Yeah, without clothes, that, that's allowed as long as it's on the stages and that type of thing. Uh, Detective Kelley is here too from the police department if you have any questions about you know, these kind of businesses, I guess. It's been a very laborious couple of months working on this. I tell you it's . . .

Christi Houser: This is actually the first one right?

Roger L: Well, this is it since I've been here. That's correct. Apparently, some years ago but since

Christi Houser: Oh really

Roger L: . . . but since I've been here this is the first that's wanted to come in or tried or . . .

Jon Johnson: We used to have them several years ago. (To Detective Kelley) Did you have any comments you wanted to make?

Detective Kelley: In my function, or most of the time is the vice function, . . . (inaudible) . . . with a few of the problems that some of these business have. I've been in undercover investigations at more specifically Tukwila's Deja Vu that doesn't have an ordinance similar to this and all sorts of, you know, illegal activity is going on. Almost every dance is illegal. If you, you could get this through it would really be beneficial.

Roger L: Um, Just another comment, I've got a couple of changes I still want to make to it I wanted to work on the definition of nudity a little bit clean it up so it's easier to understand. Well I mean . . . (laughter)

Leona Orr: What part of nudity don't you understand Roger? (laughter)

Roger L: Believe me I had to use a dictionary on some of this stuff, I hate to say . . . there's a couple of typos and things I wanna change, work on a little bit a couple of changes on the definitions especially on nudity and I want to make sure it's clear, matter of fact Detective Kelley pointed this out that I want to make it clear that violations not only of the operators but also the patrons would be a misdemeanor or violation because there is

prohibited activity of patrons you know like not being on the stage or not touching, that type of thing. And so, I want to make sure that there is an offense for that as well so I'm going to change the penalty section. With that, those are really only the changes I have.

Leona Orr: I've got a couple of spots I found and maybe you've already picked up on em, but, just in case. On page four, number seven " . . . It's necessary to have licensed manager on the premises to establishment" should it be " . . . of establishment"?

Roger L: " . . . of establishments".

Leona Orr: Yeah, and on page 20, letter E, name of business, it talks about he and his license it should say he/she or his/her or something.

Roger L: Right

Leona Orr: It does, that at least everywhere else that I saw it did, and then this place it didn't. And then . . .

Roger L: Should operate business nor shall he or she conduct business (inaudible) his or her license, okay.

Leona Orr: And on page 30 the section at the bottom of the page one, two, three, four, five. Six lines down adult entertainment business or any other services instead of any . . . so that's the space that you might not . . .

Roger L: This is the one that I'm going tc change probably so, this is the penalty section cuz this one only addresses operators and those without you know needing licenses I want to make sure that it does that other so. And I'm probably going to make it a simple misdemeanor for these kind of violations, uh and then we'll also have

the revocations. I'm not sure . . . I'm going to look at it . . . I thought of the . . . most of the cities seem to use it as a simple misdemeanor, $1,000; 90 days in jail type of thing so probably we'll want to be able to issue these and not have . . .

Christi Houser: So you want us to have a public hearing at one of the Council meetings?

Roger L: My suggestion, I would like to pass this thing quickly but I think we need to have a hearing and I need to have Mr. Levy have an opportunity to have this document. I mean I've been operating with in him good faith on this thing and so I want to make sure that he does have a copy of this. Um, I would like, I would suggest that we have a hearing at the next meeting and then if you want to adopt at that point, feel comfortable with it go ahead.

Jon Johnson: That would be March 7; would it also be your recommendation then to adopt at the same meeting?

Roger L: If you're comfortable with it; if you think you're satisfied that it addresses the concerns.

Christi Houser: I want to compliment you on this you've done a really good job. I know it's been a lot of work but we appreciate it.

Roger L: This is like the eighteenth draft and its unfortunate I don't like lengthy regulation ordinances but when your dealing with a protected constitutionally, marginally though, constitutionally protected activity you gotta be kinda, you gotta be careful, you can't have much discretion in the administrators of the ordinances and

licenses and so unfortunately to do this and be this comprehensive and cover all these types of activities it needed to be lengthy but . . . So, I do apologize for that but I really didn't have much choice in that. And every time I look at it I always find something I could change that's why I gotta stop looking at it.

Leona Orr: Well you have until March 7.

Roger L: Well I'll make those changes that we talked about and if you agree with the hearing process than [sic] maybe we can schedule it if that's what you want to do.

Brent McFall: What the hearing will do is allow us, there's a number of finding of facts in here that will give me the opportunity to make those findings.

Christi Houser: It's fine with me.

Leona Orr: Yeah, do you need a motion? I would move to send this to public hearing on March 7.

Christi Houser: Second.

Jon Johnson: Moved and seconded, discussion? All those in favor say "aye".

Christi Houser: Aye

Leona Orr: Aye

Jon Johnson: Aye

Jon Johnson: Motion carries.

Kelli O'Donnell: Do we need to make a motion to put it on other business too.

Jon Johnson: Well, yeah it should go under public hearing . . . (inaudible)

Roger L: . . . submitted for Council action. We'll just have the ordinance in the packet. If you're satisfied with it at the close of the hearing we can adopt it. If you want more work on it or whatever you can do that.

Leona Orr: We're going to send it back for a rewrite (laughter). Twenty-one drafts sounds like a good idea.

Roger L: You know like I said in the Council meetings or at other meetings we can't keep these facilities from coming into Kent. I mean I'v talked about that many times but this is one thing that we can do. So,

Christi Houser: I think that you should have a private, separate conversation with Paul about that.

Roger L: I understand that. I mean as much I would, you know we all would like to ban them including myself its, you know, trying to appeal up the supreme court is like jumping off a building without a parachute and expecting to come with a safe landing. It just isn't going to work.

Jon Johnson: Brent, do you want to introduce our new employee?

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

I, Kelli O'Donnell, the undersigned, as Secretary of the Operations Committee in and for the City of Kent, Washington, do hereby certify that the attached is a true and correct copy of the verbatim Operations Committee

Minutes relating to Adult Entertainment passed by the Operations Committee on February 22, 1995.

IN WITNESS WHEREOF, I have hereunto fixed by hand this twenty-eighth day of May, 1996.

/s/ Kelli O'Donnell
Kelli N. O'Donnell
Secretary of the Kent City
Council Operations Committee

Adult Entertainment – Corrective Ordinance (Verbatim):

Jon Johnson: Adult Entertainment

Brent McFall: You're on your own Roger, I got to go to Western Processing. (laughter)

Leona Orr: Good luck

Roger Lubovich: Thanks a lot

Christi Houser: I was really encouraged by the Bellevue; he didn't close em down but he . . .

Roger L: Well that's, there's a lot of those cases; that's the reason why we're doing a lot of this.

Christi Houser: But still he uh, said they, uh . . .

Roger L: It's actually, it's kind of interesting that the courts are kind of a, are a authorizing the enforcement of these types of provisions. That's kind of a, I think it's almost a turn around but, uh . . . This is something that I'm kind of getting sick of working on. I've been actually working on it since January, beginning of January, and it's one that's uh was critical that we get on the books last month because of the potential facility coming into town.

Since we adopted that ordinance, there's been a Seattle case dealing with staying city's actions with respect to revocation of licenses and there has been also a Bellevue case with a four foot setback and some other areas dealing with signages and stuff which we have incorporated here. I also took the opportunity to make some changes to make certain provisions more clear, cuz I'm looking at it from a defense point of view if somebodies going to challenge it what would they take on. I spent some time making some more revisions, the more I look at it the more I make . . . more revisions on it. I sat down and I decided I had a product that I should probably, since there is so much litigation going on right now with it, send it to an attorney that is counseling Bellevue. Not involved in litigation, but counseling Bellevue on this area, an expert. That Mr. Heller, Bob Heller of Wright L. Williams, made a number of comments most of em which I have incorporated. I then sat down with uh, with Captain Miller, and we debated some of those provisions and made some changes. I talked with Mr. Heller again, we debated some more of those provisions and made some more changes and I was here late last night putting this thing together and it's just hot off the printer right now. Uh, I thought since this was really important and critical uh, that I would probably walk through some of the major provisions so you have a clear understanding of what I'm doing and why I'm doing it. If you'ld [sic] like. You know I think it's, I think important. The problem with this kind of activity, it's constitutionally protected you've got to be very precise. Cuz they challenge anything on that thing . . .

Christi Houser: It's getting really heavy though Roger.

Roger L: It's the same weight (laughter)

Christi Houser: I don't have thirty pages here.

Roger L: What I did is

Christi Houser: I only have seventeen.

Roger L: What I did is since we've done all this I just put the whole document, the whole code back together, rather than portions. I mean you get to a point where why we just have half of it with changes and not the whole thing. But this way you can get a comprehensive review. At this point I feel real, real good about this ordinance. I think there's a couple of policy issues which I want to run by you to make sure you understand em and are agree with em. But I'm very, very comfortable with this and there's only a couple of areas where there is a potential of a challenge I think and I'll get to those when I get there. Basically, I'm not going to get to the minor language corrections but uh, page four, we're dealing with adult entertainment. The problem, this address the Bellevue problem, they have a facility called Babes where they dance but they're clothed and they say they're not adult entertainment because they're clothed, they're not nude. Yet, there that's the one they just had get out of court the other day and got fined for. I wanted to make it clear that even if you're dancing up there and you're clothed but you're sexually arousing people that that's adult entertainment. So that's what the change . . .

Christi Houser: (laughter) how do you determine that?

Leona Orr: (laughter) wearing a candy wrapper

Roger L: Well they're in G strings and they're up there . . .

Christi Houser: How do you decide that people are aroused by these women. I mean is this a check you do? or what? I mean (laughter) the police officer has to decide . . . (laughter, inaudible)

Roger L: Well I don't know how to react to that. Unblush myself, but anyway that's what the attempt was because they're up there what they call bumping and gyrating up there and uh, with their cloths [sic] on and uh, and uh, basically, they're not nude but they're close to it and that's what this is attempting to identify or take into . . . So they can't come in and say "well we're not an adult entertainment, we don't need to go through all that regulation", uh that's the problem with Babes and that's what this addresses so that wouldn't be an issue here. Um, I've also um, let's see, made some um, well basically, this is just, the rest of page five is just some clean up changes. Page six is a duplication of a definition of adult entertainment video stores, so I just eliminated it since it caused some confusion. Page seven, I struck out the definition of materially false representation cuz it talked about the misrepresentation which could affect the course of a license application process. The problem is some of the information you go maybe misrepresented would not of necessarily been a grounds for denial of a permit. So it wasn't really strong enough and it was contradicting some other language that says that any, you know, substantial misrepresentation can be grounds for denial so we just took out, cuz it's adding some potential challenge for it later. Page nine was just another clarification making it clear that the uh, whoever's administrating this code deals with all licenses. Not just the business licenses but the managers and entertainers. Page ten, um, I

wanted, what I wanted to do is we got to be careful not to be overly burdensome on some of these businesses so that they have a challenge. We have what I call kind of a passive adult entertainment. Basically, there is no onsite entertainment. Like bookstores, video stores. They're just selling, they're not having onsite entertainment. And I thought it might be too burdensome to require every type of bookstore to have a license manager on the premises. Cuz it's quite a lengthy process to get a license with all the application process. And also expensive if you have a number of clerks running the store. And I thought that was pretty burdensome. So basically, we only require a managers license, they still have to have an adult business license for the premises, but any manager . . . manager's license is only required for those types of facilities that have onsite entertainment, you know,

Christi Houser: That makes sense . . .

Leona Orr: Sure

Roger L: So, just didn't want a challenge on a burdensome application process, as Gil Levy was hinting to at that hearing at . . . , uh, that's basically, uh, basically the issue there. On the application for the business license, this will make Jim happy, we were debating this yesterday, we cannot require every owner, like stockholder of a business of the corporation applying for license to submit all of this information. There is a court case that indicates that. Anybody that's in a like manager, I mean a manager, or director, or officer of corporation, or a partner, you can require them to submit all their background checks and stuff because they are managing. Being an officer or director implies your managing or have some operational

management responsibility. But just being a mere stockholder is not enough to require submission of documents. There is a case to that effect and so we just require that any officer, director, manager, administrator, or any person having any managerial responsibility. So it's still pretty inclusive. We're also requiring criminal background checks. We don't want to go back forever but, because it might be overly burdensome, but we wanted to go ten years, we decided on ten years yesterday, yesterday, Jim and I did and uh, we wanted to make sure we have enough background on an individual, the criminal background. Uh, page twelve, basically, it just requiring that when you come in for an application that you comply with the construction standards like for stage and that type of thing for an exotic dance studio. We just wanted to tie it in to the requirements that there be a stage of so many heights and so much distance from the patrons, that type of thing. We also have uh, an application process where if you, if we, we had it written that if the clerk deems that there's not enough information the clerk may grant an extension. That's too much discretion probably for the city. We decided that if it's not adequate information that the applicant can request an extension of time. Fill in the application and we will grant it but it won't exceed twenty days so we did put a time limit on it. Um, page thirteen the uh important provision here is that paragraph fifteen which is new, in the application the, for those more passive businesses, the bookstores and video stores, we're not going to require photographs and fingerprinting because that is could be deemed as a burdensome application process for a passive adult entertainment business like a bookstore. Uh, we also dealt

with, middle of the page, deals with new building construction. They come in for a license. How can we grant a license until we know that they actually conform to the construction standards like stages and that type of thing so we, it's a conditional approval subject to final inspection and we determine that they actually do comply. Um, page fourteen, C, the uh, we're not going [sic] require a manager or entertainers license for each facility. There's too many application process. But we are going to require that get endorsed on the single license for each facility they work at. So if they come in and say, "I'm working at facility A, B, and C." it has to be endorsed on the license uh, so they come in and do the licensing once, but they have, they can only work at those facilities that they've put on the application where they were going to work. Again, it's the burdensome application process we're worried about a challenge on. So, but they have to be registered basically to work at any facility that they are applying for. . . . Uh, I guess that's not, on page sixteen, at the Council meeting I recommended that we at Levy's, uh because of Levy's argument that managers get issued a temporary license like an entertainer does, um, so it's not declared what's called a prior restraint on speech, they can perform, the dancers can perform prior to getting a, you know the fourteen day period to get a formal license. The following research we determined that a manager does not have that same right to a, you know, it's not a prior restraint issue so far with the courts with managers so we decided that maybe it'd be better to put it back in. That they just, they don't get a temporary license. The entertainers have to by court case law but there's nothing that says a manager is entitled to it, to an immediate

license, a right to manage. So, we're going to leave that, we're going to recommend we put it back in. Uhm, lets see I think we're moving right along now. Page twenty, this is again at the top of the page, we're talking about that you must be endorsed by the clerk for the facility the entertainers work in and we're not going to allow for photocopies. We need the original license on person with them at each facility. Uh, 110, section 110, which is the, this is the big, 110 and 120 are the big sections for exotic dance studios. Uh, what I did is on this, this 110 deals with the construction standards, the stage and that type of thing, and we want to make it clear that the stage has to be situated so there's no dancing or performances within ten feet of the patron. We're basically tied into the next section which is the standard of conduct which requires a ten foot separation on stage dancing. And the same thing uhm, let's see, ahh, C, page 21, top of the page, that is the result of the Bellevue case that says no, we had a provision that no signs or any sketches, drawings, or performances must be visible from the outside. The court in Bellevue said that you can't do that to signs because that's not conduct. I disagree with it and I think Bellevue's gonna cross appeal that when it goes to Supreme court but rather than have the challenge here, we decided at this point to take it out but require that no adult entertainment performances can still be visible from the outside. And that's conduct so we're going to do that. I don't agree with their decision but I'm not the court soo.[sic] 120, section 120, those are the constru [sic] or the entertainment standards that I was talking about. These are the critical ones for the adult entertainment. This is the ten foot separation. Uh, what I did is redefined it to

say all dances, performances, or exhibitions. I want to make it very clear that all dances, whether you're dressed or not, any entertainment, has to be on the stage ten feet. So, I don't want any, just because you're not nude doesn't mean you can go down on the stage, or off the stage and dance to a patron. I want to make sure all performances are on a stage. Whether or not they're nude or whatever. And basically, I think the, page twenty four, section 130, we regulated uhm adult arcades with respect to like only eighteen year olds and above can be in those facilities. But we really didn't address that with the picture theaters, bookstores, and other, or not bookstores, but you know theaters and arcades, and so we wanted to make sure that it's no adult entertainment business can have anybody in there that's under eighteen years old. And so I just reworked the whole section to make sure that its clear that it covers all facilities. That's really what it does. The next section, 140, we regulated the, basically we require bookstores and video stores and novelty stores, like Lover's Package. If more than 20% of their stock and trade is in adult entertainment material, they need an adult entertainment business license. But we are also concerned with those facilities that were less than 20%, we still don't want them selling to minors. Uh, like Playboy magazines or Penthouse or whatever, or any adult videos in a big video store.

Christi Houser: They're not supposed to anyway are they?

Roger L: Well we're making it clear under this that they can't. And, uh, but we didn't address it to those facilities again that were required to have an adult entertainment license. So we want to make it clear that all facilities,

whether or not they're an adult entertainment business, must abide by these regulations and keep material away from minors. That's what this whole change is about. Then, uh, let's see go to page twenty-seven, uhm twenty-six was just cleaning up some language on obscenity. Make sure it meets the constitutional standards that have been discussed in case law. Twenty-seven we require reporting of these facilities, exotic dance studios to, to uhm . . . it says erotic dance studio, I've got to clean that up, uh exotic dance studio to the city (laughter), I've been in this thing too long.

Christi Houser: You better mark that right now.

Roger L: Anyway, anyway, we want make sure that they say they're independent contractors, we want to make sure that these tips that are paid indirectly through management are also reported to us so we have an idea what's going on. Uh, the last issue here, I think it's the last issue, is that the Seattle case said that you have to stay action on any revocation or suspension of a license. It also includes renewals of licenses, during the pendency of any judicial appeal. We stayed action during a hearing examiner process but not to the judicial appeal following if they go that far. So, we're abiding by the Seattle, the one that came out two weeks ago I think, make sure that we abide by that same criteria. Basically, that's it. It's more than I anticipated on a rewrite but uh, it's been through a lot of scrutiny and there's only two issues that are potential issues. I just want to mention them to you. Is the ten foot requirement and requirement be on stage is a lot stricter than Bellevue's.

Christi Houser: Isn't it eight foot or six foot . . .

Roger L: Bellevue allows table dancing but four feet. We don't allow that. They have to be on a stage and ten feet. Uhm, I suggest we leave our, the outside Counsel suggests we go to Bellevue standard, I suggest we leave this one in. If it goes to the Supreme Court, which it is anticipated will probably take a year, and they determine that it, on very edge, about as far as you can go, then we can adopt ours or amend ours to do the four foot rule which is still an impact. If they say that it's more than reasonable regulation then we'll leave the ten foot and they'll have to challenge it to change it but it will depend on what the Supreme Court says. But I suggest in the meantime, the four foots upheld, we'll keep this as a ten foot. If it was struck down, then it would be a whole different story. But I was so pleased when they upheld that. The other issue is the 20% stock and trade. There is a case, Worldwide Video in Tukwila, that said 10% was, you couldn't require, they had a 10% requirement, it was 10% or less it was okay but more than 10% was adult entertainment and regulated. They struck that down as too restrictive. We're going 20%. It's not determined. There's no court case that says 20 or 30% or 50 or 80%, so I'm leaving it at 20%.

Christi Houser: I'm not as concerned about that as the stage thing. And I'm glad that you made all the changes you did in here so that we aren't going to get caught up in a court case on anything else. You know because, we need to, the stage is the biggest thing in my mind anyway.

Roger L: Absolutely, that's the biggest, that and the money exchanges, having to go through the facility and the management of the business. That really, that puts the

management into any activity that goes on. So he's going to have some accountability on whatever happens. Jim did you have anything to . . .

Jim Miller: Other than my profession would prefer that it would be tighter than this but I know realistically Roger has got it as tight as we could get it. (inaudible comment)

Roger L: And it's, this is an ever changing, I mean in two or three months it could change again but I'm quite satisfied that we've covered, I mean I can't think of anything that can be challenged except those two issues potentially. And those are big issues, they're not going to be resolved in a superior court at this point at least the stage issue. That's going to have to go to Supreme Court. Pierce County also has a prohibition on table dancing. It is pending I understand before the Supreme Court. So probably one will be stayed while the one's decided or maybe consolidated so there'll be a decision probably impacting our criteria so. But it will be a year down the line, in the meantime we've got it in place.

Leona Orr: Very good

Roger L: Sorry it took so long but this is really a

Leona Orr: No, I'm, I am extremely pleased with the work you've done and I know it's been difficult

Christi Houser: Yes

Leona Orr: . . . but it's necessary.

Roger L: Oh it is. If we waited until a facility came in and then started worrying about it. It's kind of late.

Leona Orr: Yep, you're right.

Jim Miller: I think Roger could probably spout this in his sleep.

Leona Orr: He probably does (laughter) nightmares

Roger L: That's why my wife keeps doing this – "What are you doing? What's this table dancing business". (laughter) I tell you this has been the but [sic] of more jokes . . . did it again. (laughter) I'm sorry but I've got to get a life here.

Christi Houser: I move to adopt this ordinance and send it on to the Council for full Council approval.

Roger L: We did set it for hearing because the first one was done by hearing.

Leona Orr: That's fine, second.

Jon Johnson: We could, Council has to set a date for a hearing.

Roger L: Or we could just set it, we're already setting it I think. We don't have to have the Council set the date of the hearing. We didn't last time did we.

Christi Houser: We can set the date right now.

Roger L: We're just, I mean this is not a zoning issue we're just having a hearing. And I think we're just going to send out notice of a hearing with the packet.

Jon Johnson: Okay

Roger L: It's not a zoning issue that has or 10 or 20 day or something (inaudible) . . . that's okay unless you want to set a date for a hearing.

Christi Houser: Are you going to set the hearing for the eighteenth. Oh man we're going to have a mess the eighteenth.

Roger L: Well we can delay it.

Christi Houser: Well it's just that we're going to be up on the West Hill the eighteenth. And, Leona's expecting about, a few people on the growth management

Roger L: Oh

Leona Orr: The Comprehensive Plan is coming out on Planning Committee's recommendation

Roger L: That's fine why don't we just, uh set it for the next one

Christi Houser: Is it important that we

Leona Orr: I'd like to see it adopted as soon possible

Christi Houser: Yeah, so would I. Um, but if we have to have a hearing than couldn't it, having the meeting up there makes it kind of tough for some of the people to get there.

Roger L: Based on what happened, we didn't have anybody testify last time. Because it was a restrictive regulatory matter . . .

Jon Johnson: Actually I think it might be good to have this issue up there considering Pacific High activity that takes place.

Christi Houser: Okay

Leona Orr: Yeah I don't have, if we have a long meeting that one meeting.

Roger L: Whatever, I mean whatever you'ld [sic] like to do with it.

Christi Houser: Okay, well uhm, does it have to be, do you want that in the motion.

Roger L: No, if you're happy with it we set it.

Christi Houser: Set it for the eighteenth.

Roger L: We're doing it as a just a . . . we don't have to have a hearing on it. We just suggest it's a good idea just because of the nature of the beast.

Jon Johnson: Okay, it's been moved and seconded right. Any further discussion. All those in favor say aye.

Jon Johnson: aye

Christi Houser: aye

Leona Orr: aye

Jon Johnson: Opposed . . . motion carries

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

I, Kelli O'Donnell, the undersigned, as Secretary of the Operations Committee in and for the City of Kent, Washington, do hereby certify that the attached is a true and correct copy of the verbatim Operations Committee Minutes relating to Adult Entertainment passed by the Operations Committee on April 12, 1995.

IN WITNESS WHEREOF, I have hereunto fixed by hand this twenty-eighth day of May, 1996.

/s/ Kelli N. O'Donnell
Kelli N. O'Donnell
Secretary of the Kent City
Council Operations Committee

EXHIBIT F

CITY ATTORNEY'S OFFICE

DATE: March 2, 1995

TO: Mayor Jim White
Kent City Council

FROM: Roger Lubovich /s/

RE: ADULT ENTERTAINMENT BUSINESS LICENSING ORDINANCE

The attached ordinance establishes a new chapter regarding adult entertainment licensing replacing Chapter 5.11 of the Kent City Code. The proposed ordinance was drafted following a thorough review of our current licensing code to provide for a more comprehensive licensing system for adult entertainment businesses within the City. The key features of the proposed ordinance are as follows:

1. Whereas, Chapter 5.11 only dealt with licensing of exotic dance studios, the proposed ordinance expands

licensing regulations to include adult arcades, adult book stores, novelty stores or video stores, and adult motion picture theaters in addition to exotic dance studios. Our current zoning code zones adult book stores and theaters in addition to dance studios, therefore, it was deemed appropriate to extend licensing regulations to cover these facilities.

2. For exotic dance studios, adult entertainment (dancing) is to be performed on a performance stage or platform designated for that purpose, and that no entertainment or dancing shall occur closer than 10 feet to any patron.

3. The proposed ordinance provides that no entertainer employed at an exotic dance studio shall solicit any gratuity or payment from a patron, and that no customer or patron shall directly pay or give any gratuity or other payment to an entertainer.

4. The proposed ordinance provides for two types of licenses:

   A. An owner's or operator's business license (see Section 5.10.060(A) on page 8 for licensing criteria); and

   B. A manager's or entertainer's license for managers of adult entertainment businesses or entertainers (dancers) for the same (see Section 5.10.060(C) on page 10 for licensing criteria).

5. The proposed ordinance also establishes standards of conduct applicable to exotic dance studios. (See Section 5.10.120 on page 15.)

6. The license application processing fee for adult entertainment business licenses is $150.00 and the application processing fee for a manager's or entertainer's license is $100.00. The annual license fee for an exotic

dance studio business is $500.00, and all other entertainment businesses is $150.00. The annual fee for a manager's or entertainer's license is also $150.00. These amounts are in additional to the application processing fees.

7. All licensing decisions can be appealed to the hearing examiner, and from the hearing examiner to the Superior Court.

ORDINANCE NO. ___

AN ORDINANCE of the City Council of the City of Kent, Washington, relating to the regulation of adult entertainment businesses as defined herein, providing for the licensing of such businesses, further providing standards of conduct and operation, including the regulation of certain physical features of exotic dance studios, repealing Ordinance No. 2778, and establishing misdemeanor offenses and penalties for the violation of such regulations.

WHEREAS, cities have the right to enact laws for the protection of the public health, safety and general welfare; and

WHEREAS, various Washington State municipalities have found it is necessary for the public health, safety, and welfare to regulate businesses, managers, and employees that provide adult entertainment as well as the patrons of adult entertainment businesses; and

WHEREAS, the City conducted a study of the impacts of adult entertainment places and adult uses in its city in a report entitled "City of Kent – Adult Use Zoning Study" issued by the Kent Planning Department

in November, 1982, which is incorporated herein by this reference; and

WHEREAS, thereafter, in order to protect and preserve the health, safety, and welfare of the City, the Kent City Council established land use and licensing regulations for adult entertainment businesses; and

WHEREAS, by its adoption of Ordinance No. 3185, the City Council imposed a moratorium on adult entertainment businesses within the City of Kent so that land use regulations governing the location of such establishments could be formulated to comply with the ruling of the U.S. District Court for the Western District of Washington in Cause No. C94-256Z on the City's land use regulations for such businesses; and

WHEREAS, the City Council has determined that adult entertainment, including nude and semi-nude dancing, in public establishments is frequently linked to patron, employee, and owner participation in criminal activity including controlled substance violations, liquor law violations, prostitution, and, generally, increased criminal activity; and

WHEREAS, the City takes notice of the experiences of other cities and counties in combating the specific adverse impacts of businesses providing adult entertainment including nude and semi-nude dancing; and

WHEREAS, adult entertainment businesses require special supervision in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the communities where they locate and that it is appropriate, at this time, to

review licensing regulations of adult entertainment businesses; and

WHEREAS, a hearing has been held by the City Council to hear public testimony concerning the adverse secondary impacts of businesses providing adult entertainment; NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF KENT, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. There is hereby created a new section of the Kent City Code, Section 5.10, entitled "Adult Entertainment", as follows:

CHAPTER 5.10. ADULT ENTERTAINMENT

Sec. 5.10.010. Findings of fact.

Based on public testimony and other evidence and information before it, the city council makes the following findings of fact:

1. The activities defined and regulated in this chapter are detrimental to the public health, safety and general welfare of the citizens of the city and, therefore, such activities must be regulated as provided in this chapter.

2. Regulation of the adult entertainment industry is necessary because, in the absence of such regulation, significant criminal activity has historically and regularly occurred. This history of criminal activity in the adult entertainment industry has included prostitution, narcotics and liquor law violations, breaches of the peace and the presence within the industry of individuals with

hidden ownership interests and outstanding arrest warrants.

3. Contact between entertainers and patrons of adult entertainment businesses facilitates prostitution and other related crimes and the concern over unlawful sexual activities and related crimes is a legitimate health concern, of the City which demands reasonable regulation of adult entertainment businesses in order to protect the health and well-being of the citizens; and

4. Licensing is a legitimate and reasonable means of accountability to ensure that operators of adult entertainment businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation; and

5. In the absence of regulation, the activities described in this section occur regardless of whether the adult entertainment is presented in conjunction with the sale of alcoholic beverages.

6. It is necessary to license entertainers in the adult entertainment industry to prevent the exploitation of minors, to ensure that each such entertainer is an adult, to ensure that such entertainers have not assumed a false name which would make regulation of the entertainer difficult or impossible and to ensure that such entertainers are not involved in criminal activity.

7. It is necessary to have a licensed manager on the premises of establishments offering adult entertainment at such times as such establishments are offering adult entertainment so that there will, at all necessary times, be

an individual responsible for the overall operation of the establishment, including the actions of patrons, entertainers and other employees.

8. The license fees required in this chapter are nominal fees imposed as necessary regulatory measures designed to help defray the substantial expenses incurred by the city in regulating the adult entertainment industry.

9. Hidden ownership interests for the purposes of skimming profits and avoiding the payment of taxes have historically occurred in the adult entertainment industry in the absence of regulation. These hidden ownership interests have historically been held by organized and white collar crime elements. In order for the city to effectively protect the public health, safety and general welfare of its citizenry, it is important that the city be fully apprised of the actual ownership of adult entertainment establishments.

10. The City Council desires to prevent these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the quality of life, preserve the property values and character of surrounding neighborhoods; and deter the spread of urban blight; and

11. It is not the intent of this chapter to suppress any speech activities protected by the First Amendment or Article I, Section 5 of the Washington State Constitution, but to enact content neutral regulations which address the secondary effects of adult entertainment businesses, as well as the health problems associated with such businesses.

Sec. 5.10.020. Purpose and intent.

It is the purpose of this chapter to regulate adult entertainment businesses and related activities to promote health, safety, morals, and general welfare of the citizens of the City of Kent, and to establish reasonable and uniform regulations to prevent the establishment of adult entertainment businesses in locations within the City which would have a harmful effect on the residents of the City. The purpose of this chapter is to alleviate undesirable social problems that accompany adult entertainment businesses, and to enact content neutral regulations which address the secondary effects of adult entertainment businesses as well as health problems associated with such business, not to curtail the First Amendment expression, namely dancing or entertainment. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the State or Federal Constitutions, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this chapter to condone or legitimate the distribution of obscene materials.

Sec. 5.10.030. Definitions.

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them

in this section, except where the context clearly indicates a different meaning:

1. *ADULT ENTERTAINMENT*: "Adult Entertainment" means any dance, amusement, show, display, exhibition, pantomime, modeling or any other like performance of any type where such is characterized by the performer's "nudity", as defined herein, or the exhibition of "specified sexual activities", also defined herein, which emphasizes and seeks to arouse or excite the patron's sexual desires for the use or benefit of a member or members of the public or advertised for the use or benefit of a member of the public.

2. *ADULT ENTERTAINMENT BUSINESS*: "Adult Entertainment Business" shall mean an Adult Arcade, Adult Bookstore, Adult Novelty Store, Adult Video Store, Adult Motion Picture Theater, and Exotic Dance Studio, more specifically defined as follows:

A. *Adult Arcade*: "Adult Arcade" shall mean an establishment where, for any form of consideration, one or more still or motion picture projectors, slide projectors, computer generated or enhanced pornography, panoram, peep show, or similar machines, or other image producing machines, for personal viewing, are used to show films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "nudity" or "specified sexual activities".

B. *Adult Bookstore, Adult Novelty Store, or Adult Video Store*: "Adult Bookstore", "Adult Novelty Store", or "Adult Video Store" shall mean a commercial establishment which has as a significant or substantial portion

of its stock-in-trade or revenues, substantial meaning twenty (20) percent or more, for any form of consideration, books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, or other photographic reproductions or visual representations which are characterized by the depiction or description of "nudity" or "specified sexual activities".

1. An establishment may have other principal business purposes that do not involve the offering for sale or rental of materials depicting or describing "nudity" or "specified sexual activities", and still be categorized as Adult Bookstore, Adult Novelty Store, or Adult Video Store, Such other business purposes will not serve to exempt such establishments from being categorized as an Adult Bookstore, Adult Novelty Store, or Adult Video Store so long as one of its principal business purposes is offering for sale or rental, for some form of consideration, the specified materials which depict or describe "nudity" or "specified sexual activities."

2. Video stores that sell and/or rent only video tapes or other photographic reproductions and associated equipment shall come within this definition. It shall be a rebuttable presumption that twenty (20) percent of a business' stock-in-trade or revenues is considered substantial.

C. *Adult Motion Picture Theater*: "Adult Motion Picture Theater" shall mean a commercial establishment where films, motion pictures, video cassettes, slides, or similar photographic reproductions characterized by the depiction or description of "nudity" or "specified sexual

activities" are regularly shown for any form of consideration.

D. *Erotic Dance Studio*: "Exotic Dance Studio", also known as "topless bar" and "adult cabaret", shall mean a nightclub, bar, restaurant, or similar commercial establishment to which any member of the public is invited or admitted and where an entertainer provides live adult entertainment performances to any member of the public.

3. *CITY*: "City" means the City of Kent, Washington.

4. *CLERK*: "Clerk" shall mean such city employees or agents as the mayor shall designate to administer this chapter, or any designee thereof.

5. *CONVICTION*: "Conviction" means an adjudication of conviction of guilt and occurs at such time as a plea of guilty has been accepted or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-fact finding motions, and appeals. Conviction also means a bail forfeiture.

6. *EMPLOYEE*: "Employee" means any and all persons, including managers, entertainers, and independent contractors who work in or at or render any services directly related to the operation of any adult entertainment business offering adult entertainment, whether or not such person is paid compensation by the operator of said business.

7. *ENTERTAINER*: "Entertainer" means any person who provides live adult entertainment in an adult

entertainment business whether or not an employee of the operator and whether or not a fee is charged or accepted for such entertainment.

8. *ESTABLISH*: "Establish" shall mean and include any of the following:

A. To open or commence any adult entertainment business as a new business; or

B. To convert an existing business, whether or not an adult entertainment business, to any adult entertainment businesses defined herein.

C. To add any of the adult entertainment businesses defined herein to any other existing adult entertainment business; or

D. To relocate any such adult entertainment business.

9. *LICENSE*: "License" shall mean a license to operate, manage or entertain at any premises that is classified as an adult entertainment business.

10. *LICENSED PREMISES*: "Licensed Premises" shall mean any premises that requires a license and that is classified as an adult entertainment business.

11. *LICENSEE*: "Licensee" shall mean a person in whose name a license to operate, manage or entertain at an adult entertainment business has been issued, as well as the individual listed as an applicant on the application for a license.

12. *MANAGER*: "Manager" means any person appointed by an owner or operator of an adult entertainment business who manages, directs, administers or is in

charge of the affairs and/or the conduct or operation of an adult entertainment business and includes assistant managers.

13. *MATERIALLY FALSE REPRESENTATION:* "Materially false representation" means any false representation or statement, oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the license application process.

14. *NUDE:* "Nude" shall mean:

A. Less than completely and opaquely covered or in such attire, costume or clothing as to expose to view male genitals, female genitals, pubic region, buttocks, anus, or any portion of the female breast below a point immediately above the top of areolae; or

B. Wearing any device or covering exposed to view which simulates the appearance of male genitals, female genitals, pubic region, buttocks, anus, or any portion of the female breast below a point immediately above the top of areolae.

15. *OPERATOR:* "Operator" shall mean and include the owner, permit holder, custodian, manager, operator, or person in charge of, conducting or maintaining an adult entertainment business.

16. *PANORAM or PEEP SHOW:* "Panoram" or "peep show" means any device which, upon insertion of a coin or by any other means, exhibits or displays a picture or view, by film, video, or by any other means.

17. PERSON: "Person" shall mean any individual, firm, joint venture, copartnership, association, social club,

fraternal organization, corporation, estate, trust, business trust, receive or any other group or combination acting as a unit.

18. *SPECIFIED SEXUAL ACTIVITIES*: "Specified Sexual Activities" shall mean and include any of the following:

A. The caressing, touching, fondling or other intentional or erotic touching of male genitals, female genitals, pubic region, buttocks, anus, or female breasts; or

B. Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, flagellation, sodomy, bestiality, or any sexual acts which are prohibited by law; or

C. Masturbation, actual or simulated; or

D. Human genitals in a state of sexual stimulation, arousal or tumescence or visual state of sexual stimulation, arousal or tumescence, even if completely and opaquely covered; or

E. Excretory functions as part of or in connection with any of the activities set forth in subdivisions A through D of this subsection.

Sec. 5.10.040. Administration of licensing.

The clerk is responsible for granting, denying, revoking, renewing, suspending, and canceling adult entertainment business licenses. The Planning Director and the Building Official or their designee are responsible for ascertaining whether a proposed adult entertainment business for which a license is being applied for complies

with all building code and land use requirements enumerated herein and all other applicable building code and zoning laws and/or regulations now in effect or as amended or enacted subsequent to the effective date of this chapter.

Sec. 5.10.050. License required; fee.

A. *Adult entertainment business license required.*

1. No person or entity shall use any property or premises for an adult entertainment business within the City of Kent except within those areas authorized for location of said businesses as set forth in Kent City Code 15.08.270, and no adult entertainment business shall be established, operated or maintained in the city unless the owner or operator thereof has obtained an adult entertainment business license from the clerk. It is unlawful for any entertainer, employee or operator to knowingly work in or about or to knowingly perform any service directly related to the operation of an unlicensed public adult entertainment business. *Violation/penalty.* Any violation of the provisions of this subsection shall constitute a misdemeanor as set forth in this chapter.

2. The annual fee for an exotic dance studio business license shall be five hundred dollars ($500.00). This amount shall be used for the cost of administration of this chapter.

3. The annual license fee for all other adult entertainment businesses subject to this chapter shall be one hundred fifty dollars ($150.00). This amount shall be used for the cost of administration of this ordinance.

4. The above-referenced licenses expire annually on December 31 and must be renewed by January 1.

5. The applicant must be 18 years of age or older.

B. *License for managers and entertainers required.*

1. No person shall work as a manager, assistant manager, or entertainer at an adult entertainment business without having first obtained a manager's or an entertainer's license from the clerk. *Violation/penalty.* It shall be unlawful and a person commits a misdemeanor as set forth in this chapter if he or she acts or performs as a manager or entertainer in an adult entertainment business without said valid and current license.

2. The annual fee for such a license shall be one hundred fifty dollars ($150.00). This amount shall be used for the cost of administration of this ordinance.

3. This license expires annually on December 31 and must be renewed by January 1.

4. The applicant must be 18 years of age or older.

Sec. 5.10.060. License applications.

A. *Adult entertainment business.* All applications for an adult entertainment business license for places which offer adult entertainment shall be submitted in the name of the person or entity proposing to conduct such adult entertainment on the business premises. All applications for an adult entertainment business license shall be signed by the applicant and notarized or certified to be true under penalty of perjury. All applications shall be submitted on a form supplied by the city, along with a

non-refundable application processing fee of one hundred fifty dollars ($150.00), which shall contain the following information:

1. Names, any aliases or previous names, driver's license number, if any, business, mailing, and residential address, telephone number, and social security numbers for each individual, partner, corporate officer, director, and other persons holding a significant interest or responsibility for management of the business, specifying the interest or management responsibility of each such individual, partner, corporate officer and/or director for each applicant. For purposes of this section, significant interest shall mean those persons who own ten percent (10%) or greater interest in the adult entertainment business.

2. If a partnership, whether general or limited; and if a corporation, date and place of incorporation, evidence that it is in good standing under the laws of Washington, and name and address of any registered agent for service of process.

3. Addresses of the applicant for the five (5) years immediately prior to the date of application.

4. Any and all criminal misdemeanor or felony convictions or forfeitures, other than parking offenses or minor traffic violations, including dates of conviction, nature of the crime, name and location of court and disposition for each individual, partner, corporate officer and/or director identified in subparagraph I above.

5. A description of the business, occupation, or employment of the applicant for the three (3) years immediately preceding the date of application.

6. Whether the applicant or any individual, partner, corporate officer, or director identified in subparagraph I above has had a previous license under this chapter or other similar ordinances from another city or county denied, suspended, or revoked, including the name and location of the adult entertainment business for which the license was denied, suspended, or revoked, as well as the date of the denial, suspension, or revocation.

7. Whether the applicant or any individual, partner, corporate officer, or director identified in subparagraph I above holds any other licenses under this chapter, or other similar adult entertainment business ordinance from another city or county and, if so, the names and locations of such other permitted businesses.

8. The single classification of license for which the applicant is filing.

9. The location of the proposed adult entertainment business, including a legal description of the property, street address, and telephone number(s), if any, together with the name and address of each owner and lessee of the property.

10. Two (2) two-inch by two-inch color photographs of each applicant, taken within six (6) months of the date of the application, showing only the full face of the applicant. The photographs shall be provided at the applicant's expense. Alternatively, the applicant may be

required to submit to a photograph taken at the direction of the clerk.

11. Complete sets of fingerprints of each individual, partner, corporate officer, and director on forms prescribed by the Chief of Police.

12. In the case of an exotic dance studio, a scale drawing or diagram showing the configuration of the premises for the proposed exotic dance studio, including a statement of the total floor space occupied by the business, and marked dimensions of the interior of the premises. Performance areas, seating areas, manager's office and stations, restrooms and service areas shall be clearly marked on the drawing. An application for a license for an exotic dance studio shall include building plans which demonstrate conformance with Kent's Building and Zoning Codes.

13. Authorization for the city, its agents and employees to investigate and seek information to confirm any statements set forth in the application.

14. Supplemental identification and/or information, as requested by the clerk, deemed necessary to confirm statements set forth in the application or determine compliance with this chapter.

B. *Processing adult entertainment business license applications.*

1. Upon receipt of the complete application and fee, the clerk shall provide copies to the police, planning and other applicable departments for their investigation and review to determine compliance of the proposed adult

entertainment business with the laws and regulations which each department administers. Each department shall, within thirty (30) days, report to the clerk whether such application and premises complies with the laws administered by each department. No license may be issued unless each department reports that the application and premises comply with the relevant laws. A department shall recommend denial of a license under this subsection if it finds that the proposed adult entertainment business is not in conformance with the requirements of any provision of any applicable statute, code, ordinance, regulation or other law in effect in the city. A recommendation for denial shall be in writing and cite the specific reason therefor, including applicable laws.

2. An adult entertainment business license shall be issued by the clerk within thirty (30) days of the date of filing a complete license application and fee, unless the clerk determines that the applicant has failed to meet any of the requirements of this chapter or provide any information required under this subsection, or that the applicant has made a false, misleading or fraudulent statement of material fact on the application for a license, or in any report or records required to be filed with the clerk. In the event the clerk determines or learns at any time that the applicant has improperly completed the application for a proposed adult entertainment business license, he/she may grant an extension of time in which to supply the required information. (The time period for granting or denying a permit shall be stayed during the period in which the applicant is allowed an opportunity to properly complete the application.) If the clerk finds that the applicant has failed to meet any of the requirements for

issuance of an adult entertainment license, the clerk shall deny the application in writing, and shall cite, in writing, the specific reasons therefor, including applicable laws. If the clerk fails to issue or deny the application within thirty (30) days of the date of filing of a complete application and fee, the applicant may, subject to all other applicable laws, operate the business for which the license was sought until notified by the clerk that the license has been denied.

C. *Manager or entertainer license.* A separate license shall be obtained for each and every establishment at which the manager applicant will manage or the entertainer applicant will entertain. All applications for a manager's or entertainer's license shall be signed by the applicant and notarized or certified to be true under penalty of perjury. All applications shall be submitted on a form supplied by the city, along with a non-refundable application processing fee of one hundred dollars ($100.00), which shall contain the following information:

1. The applicant's name, home address, home telephone number, date and place of birth, driver's license number, if any, social security number and, for entertainers, any stage names or nicknames used in entertaining.

2. The name and address of each business at which the applicant intends to work.

3. Documentation that the applicant has attained the age of eighteen (18) years. Any of the following shall be accepted as documentation of age:

a. A motor vehicle operator's license issued by any state bearing the applicant's photograph and date of birth; or

b. A state issued identification card bearing the applicant's photograph and date of birth.

c. An official passport issued by the United States of America.

d. An immigration card issued by the United States of America.

e. Any other picture identification that the city determines to be acceptable.

4. A complete statement of all convictions of the applicant for any misdemeanor or felony violations in this or any other city, county or state, except parking violations or minor traffic infractions.

5. A description of the applicant's principal activities or service to be rendered.

6. Resident addresses and telephone numbers for five (5) years immediately prior to the date of application specifying the period of residence at each address.

7. The names and addresses of employers or individuals or businesses for whom the applicant was an employee or independent contractor for the three-year period immediately prior to the date of application, including the period of employment.

8. Two (2) two-inch by two-inch color photographs of each applicant, taken within six (6) months of the date

of the application, showing only the fall face of the applicant. The photographs shall be provided at the applicant's expense. Alternatively, the applicant may be required to submit to a photograph taken at the direction of the clerk.

9. Complete sets of fingerprints of each manager and entertainer on forms prescribed by the Chief of Police.

10. Authorization for the city, its agents and employees to investigate and seek information to confirm any statements set forth in the application.

11. Supplemental identification and/or information, as requested by the clerk, deemed necessary to confirm any information set forth in the application or to determine compliance with this chapter.

D. *Processing managers or entertainers license applications.* A copy of the application shall be provided to the police and other applicable departments for its review, investigation and recommendation. An adult entertainment business manager's or an adult entertainer's license shall be issued by the clerk within fourteen (14) days from the date the complete application and fee were received unless the clerk determines that the applicant has failed to provide any information required to be supplied according to this chapter, or that the applicant has made any false, misleading or fraudulent statement of material fact in the application for a license. In the event the clerk determines or learns at any time that the applicant has improperly completed the application for issuance of a managers or entertainers license, he/she may grant an extension of time in which to supply the

required information. (The time period for granting or denying a license shall be stayed during the period in which the applicant is allowed an opportunity to properly complete the applicant.) If the clerk determines that the applicant has failed to meet any of the requirements for issuance of a managers or entertainers license, the clerk shall deny the application in writing and shall cite the specific reasons therefor, including applicable laws. If a request for extension of time is not made, and the clerk has failed to approve or deny the license within fourteen (14) days of filing of a complete application for an adult entertainment business manager's license, the applicant may, subject to all other applicable laws, commence work as an adult entertainment business manager in a duly licensed adult entertainment business until notified by the clerk that the license has been denied. An applicant for an adult entertainer's license shall be issued a temporary license upon receipt of a complete license application and fee. Said temporary license will automatically expire on the fourteenth (14th) day (or on such day established pursuant to any extension granted herein.) following the filing of a complete application and fee, unless the clerk has failed to approve or deny the license application, in which case the temporary license shall be valid until the clerk approves or denies the application, or until the final determination of any appeal from a denial of the application.

Sec. 5.10.070. Issuance of licenses.

Upon completion of the investigation and review by the departments, a review of the recommendations and

verifications, and a determination that all matters contained in the application are true and correct and that this chapter has been complied with, the clerk shall issue such license applied for in accordance with the provisions of this chapter. The applicable license fee, together with any delinquent fees that may then be due shall first be paid to the city.

Sec. 5.10.080. Denial of Application for Licenses. The clerk shall deny the application to:

a. An applicant who is under eighteen (18) years of age.

b. An applicant who is overdue on his/her payment to the City of taxes, fees, fines, or penalties assessed against him/her or imposed upon him/her in relation to an adult entertainment business.

c. An applicant whose place of business is conducted by an agent, unless such agent possesses the same qualifications required of the licensee, or in the case of a manager of an adult entertainment business, the manager has obtained a manager's license.

d. A partnership, unless all the members thereof are qualified to obtain a license as provided in this chapter. Such license shall be issued to the manager or agent of said partnership.

e. A corporation, unless all the officers and directors thereof are qualified to obtain a license as provided herein. Such license shall be issued to the manager or agent of said corporation.

f. An applicant who has failed to provide information required on a license application for the issuance of the license or has made, with the intent to mislead, a materially false representation in the application for a license under this chapter which the applicant knows to be false.

g. The applicant has failed to comply with any provision or requirement of this chapter.

h. An applicant having an interest in any license granted under this chapter revoked within six months from the date of application.

Sec. 5.10.090. License term – renewals.

A. There shall be no prorating of the license fees for licenses required pursuant to this chapter, and all such licenses shall expire on the thirty-first day of December of each year, except that in the event that the original application is made subsequent to June 30, then one-half of the annual fee may be accepted for the remainder of said year.

B. Application for renewal of licenses issued hereunder shall be made to the clerk no later than thirty days prior to the expiration of adult entertainment business licenses and managers and entertainers business licenses. The renewal license shall be issued in the same manner and on payment of the same fees as for an original application under his [sic] chapter. All applicants for a license renewal shall present their current license for verification of identity, and upon issuance of a renewed license, shall surrender the expiring license to the clerk. There shall be

assessed and collected by the clerk, an additional charge of twenty-five percent (25%) of the license fee, on applications not made on or before said date.

C. The clerk shall renew a license upon application unless the clerk is aware of facts that would disqualify the applicant from being issued the license for which he or she seeks renewal, and further provided that the application complies with all provisions of this chapter as now enacted or as the same may hereafter be amended.

Sec. 5.10.100. Other license requirements.

A. *Duty to Supplement.*

1. Applicants for a license under this chapter shall have a continuing duty to promptly supplement application information required in the event that said information changes in any way from what is stated on the application. If any person or entity acquires, subsequent to the issuance of an adult entertainment business license for places offering adult entertainment, an interest in the licensed premises or the licensed business, immediate notice of such acquisition shall be provided in writing to the clerk. The notice shall include the information required to be provided for the original adult entertainment business. The failure to supplement the application on file with the clerk regarding such change in ownership or interest, within thirty (30) days from the date of such change, shall be grounds for suspension or revocation of a license.

2. The applicant must be qualified according to the provisions of this Section and the premises must be

inspected and found to be in compliance with health, fire, and building codes of the City.

3. The fact that a person possesses other types of State or City permits and/or licenses does not exempt him/her from the requirement of obtaining an adult entertainment business.

B. *Manager on Premises.* A licensed manager shall be on duty on the premises of an adult business at all times that adult entertainment is being provided.

C. *License Nontransferable.*

No license or permit issued pursuant to this chapter shall be assignable or transferable. For purposes of this chapter, "assignable" or "transferable" shall mean and include any of the following:

1. The sale, lease or sublease of the business; or

2. The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

3. The establishment of a trust, gift or other similar legal devise which transfers the ownership or control of the business, except for transfer by bequest or other operation of law.

D. *Name of Business and Place of Business.*

No person granted a license pursuant to this chapter shall operate the adult entertainment business under a name not specified in the license, nor shall he or she conduct business under any designation or location not specified in the license.

E. *License – Posting and Display.*

1. The adult entertainment business license, if granted, shall state on its face the name of the person or persons to whom it is issued, the expiration date, and the address of the licensed adult entertainment business. The license shall be posted in a conspicuous place at or near the entrance to the licensed premises so that it can be easily read at any time the business is open.

2. The license of the manager on duty shall be prominently posted during business hours.

3. Entertainer licenses need not be posted, but must be available on the premises when the entertainer is on the premises, for immediate inspection by any city official or law enforcement agency having jurisdiction.

4. *Violation/penalty.* Any violation of the provisions of this subsection is a misdemeanor as set forth in this chapter.

F. *Inspection of licenses.*

The manager shall, upon request by any law enforcement officer or business license inspector, make available for inspection the entertainer licenses required to be on the premises as described herein.

Sec. 5.10.110. Specifications – exotic dance studios.

A. *Separation of Adult Entertainment Performance Area.* The portion of the exotic dance studio premises in which dancing and other adult entertainment is performed shall be a stage or platform at least twenty-four (24) inches in elevation above the level of the patron

seating areas. The stage(s) must be visible from the common areas of the premises and at least one manager's station.

B. *Lighting.* Sufficient lighting shall be provided and equally distributed in and about the parts of the premises which are open to and used by patrons so that all objects are plainly visible at all times, and shall be illuminated so that patrons, on any part of the premises open to the public, shall be able to read a program, menu, or list printed in eight (8) point type.

C. *Visibility.* Neither the performance nor any photograph, drawing, sketch or other pictorial or graphic representation thereof displaying nudity may be visible outside the premises of the adult entertainment business.

D. *Submittal of Plans.* Building plans showing conformance with the requirements of this Section shall be included with any application for an exotic dance studio business license.

E. *Signs.* Signs of sufficient size to be readable at twenty (20) feet shall be conspicuously displayed in the public area of the establishment stating the following:

THIS ADULT ENTERTAINMENT ESTABLISHMENT IS REGULATED BY THE CITY OF KENT. ENTERTAINERS ARE:

(A) Not permitted to engage in any type of sexual conduct;

(B) Not permitted to appear nude, except on stage;

(C) Not permitted to solicit or demand or to directly accept, or receive any gratuity or other payment from a patron.

Sec. 5.10.120. Standards of conduct and operation applicable to exotic dance studios.

A. *Standards for Patrons, Employees and Entertainers.* The following standards of conduct must be adhered to by patrons, entertainers and/or employees of exotic dance studios at all times adult entertainment is performed.

1. Admission to exotic dance studios under this section shall be restricted to persons of the age of eighteen (18) years or more.

2. All dancing and other adult entertainment shall occur on the entertainment performance areas intended for that purpose described in Section 5.10.110(A).

3. No dancing or other adult entertainment shall occur closer than ten (10) feet to any patron.

4. No patron or customer shall go into or upon the adult entertainment performance area described in Section 5.10.110(A) above while adult entertainment is being performed.

5. No employee or entertainer mingling with the patrons shall be unclothed or in a state of nudity.

6. No member of the public or employee or entertainer shall allow, encourage, or knowingly permit any person upon the premises to touch, caress, or fondle the breasts, buttocks, anus, pubic area, or genitals of any other person.

7. No member of the public or employee or entertainer shall allow, encourage, or permit physical contact between an employee or entertainer and any member of the public, which contact is intended to arouse or excite sexual desires.

8. No employee or entertainer shall perform acts in a lewd or obscene fashion or perform acts of or acts which simulate:

a. Specified sexual activities as defined in this chapter;

b. The touching, caressing or fondling of the breasts, buttocks or genitals; or

c. The displaying of the pubic region, anus, vulva or genitals except as provided for in subsection 5.10.110(A).

9. No entertainer employed or otherwise working at an exotic dance studio shall solicit any gratuity or other payment from a patron or customer.

10. No customer or patron of an adult entertainment business shall directly pay or give any gratuity or other payment to any entertainer.

11. It is unlawful for any entertainer, manager, employee, or waitperson to perform more than one such function at an exotic dance studios on the same business day.

12. It is unlawful for any entertainer to use any stage name or nickname not listed in the application for entertainers license.

13. No exotic dance studio licensee shall employ as an entertainer a person under the age of eighteen years or a person not licensed pursuant to this chapter.

14. No exotic dance studio licensee shall service, sell, distribute, or suffer the consumption or possession of any intoxicating liquor or controlled substance upon the premises of the licensee.

B. The responsibilities of the manager of an exotic dance studio shall include but are not limited to:

1. A licensed manager shall be on duty at an exotic dance studio at all times adult entertainment is being provided or members of the public are present on the premises. The name and license of the manager shall be prominently posted during business hours. Managers shall be required to verify and ensure that entertainers possess a current and valid entertainer license available for immediate inspection on the premises.

2. The licensed manager on duty shall not be an entertainer.

3. The manager licensed under this Chapter shall maintain visual observation of each member of the public at all times any entertainer is present in the public or performance area of the exotic dance studio. Where there is more than one performance area, or the performance area is of such size or configuration that one manager or assistant manager is unable to visually observe, at all times, each adult entertainer, each employee, and each member of the public, a manager or assistant manager licensed under this Chapter shall be provided for each public or performance area or portion of a public or

performance area visually separated from other portions of the exotic dance studio.

4. The manager shall be responsible for and shall assure that the actions of members of the public, the adult entertainers and all other employees shall comply with the dress code and conduct set forth in Section 5.10.120 and all other requirements of this chapter.

C. *Violation/penalty.* Any violation of the provisions of this section by a patron, owner, operator, manager, or any employee is a misdemeanor as set forth in this chapter.

Sec. 5.10.130. Regulations applicable to adult arcades.

All adult arcades shall comply with the following additional regulations:

A. *Construction/Maintenance.*

1. The interior of the show premises shall be arranged in such a manner as to insure that customers are fully visible from the waist down, and all persons viewing such panoram [sic] pictures shall be visible from the common areas of such premises.

2. The licensee shall not permit any doors to public areas on the premises to be locked during business hours.

3. Any room or area on such premises shall be readily accessible at all times for inspection by any law enforcement officer or license inspector.

4. The licensee shall maintain, at a minimum, illumination as required in this chapter for exotic dance

studios generally distributed in all parts of the premises at all times when the facility is open or when the public is permitted to enter or remain therein.

B. *Standards of Conduct.*

1. No patron shall be unclothed or in such attire, costume or clothing so as to be in a state of nudity or engage in any specified sexual activity and no owner or manager shall knowingly allow such conduct.

2. No more than one patron at a time shall be present in a booth, cubicle, room, or stall wherein adult entertainment is provided is visible.

3. *Violation/penalty.* Any violation of the provisions of this subsection by a patron, owner, operator, manager, or any employee is a misdemeanor as set forth in this chapter.

Sec. 5.10.140. Regulations applicable to video stores not qualifying as adult entertainment businesses.

A. Video stores that sell or otherwise distribute films, motion pictures, video cassettes, slides, or other visual representations which are characterized by the depiction or description of nudity or specified sexual activities, and less than 20% of their stock-in-trade or revenues comes from the rental or sale of such items shall be subject to the following regulations:

1. All such items as are described above shall be physically segregated and closed off from other portions

of the store such that these items are not visible and/or accessible from other portions of the store.

2. No advertising for such items shall be posted or otherwise visible, except where such items are authorized for display.

3. Signs readable at a distance of 20 feet shall be posted at the entrance to the area where such items are displayed stating that persons under the age of eighteen (18) are not allowed access to the area where such items are displayed.

4. The manager or attendant shall take responsible steps to monitor the area where such items are displayed to insure that persons under eighteen (18) years of age do not access the age-restricted area.

5. Employees of such video stores shall check identification of persons appearing to be eighteen (18) or under to insure that such items are not rented or sold to persons under the age of eighteen (18).

B. *Violation/penalty.* Rental or sale of obscene material (as defined by state law) or material harmful to minors (as defined by state law) to persons under eighteen (18) years of age is prohibited. Any violation of the provisions of this subsection by an owner, operator or manager of an adult entertainment business is a misdemeanor as set forth in this chapter.

Sec. 5.10.150. Exemptions.

A. This chapter shall not be construed to prohibit:

1. Plays, operas, musicals, or other dramatic works which are not obscene;

2. Classes, seminars and lectures held for serious scientific or educational purposes; or

3. Exhibitions or dances which are not obscene.

B. For purposes of this chapter, an activity is obscene if:

1. Taken as a whole by an average person applying contemporary community standards the activity appeals to a prurient interest in sex;

2. The activity depicts patently offensive representations according to city community standards of:

a. Ultimate sexual acts, normal or perverted, actual or simulated; or

b. Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

3. The activity taken as a whole lacks serious literary, artistic, political, or scientific value.

C. For purposes of this chapter, an activity is dramatic if the activity is of, related to, devoted to, or concerned specifically or professionally with current drama or the contemporary theater.

Sec. 5.10.160. Record keeping requirements.

A. All licenses, papers, records, and things required to be kept pursuant to this chapter shall be open to inspection by the clerk during the hours when the licensed premises are open for business, upon two days' written notice. The purpose of such inspections shall be to determine whether the licenses, papers, records, and things meet the requirements of this chapter.

B. Each adult entertainment business shall maintain and retain for a period of two years the name, address, and age of each person employed or otherwise retained or allowed to perform on the premises as an adult entertainer, including independent contractors and employees. This information shall be open to inspection by the clerk during hours of operation of the business upon twenty-four hours notice to the licensee.

C. No later than March 1 of each year an erotic dance studio licensee shall file a verified report with the clerk showing the licensee's gross receipts and amounts paid to entertainers for the preceding calendar year.

Sec. 5.10.170. Inspections.

In order to insure compliance with this chapter, all areas of licensed adult entertainment businesses which are open to members of the public shall be open to inspection by city agents and employees during the hours when the premises are open for business. The purpose of such inspections shall be to determine if the licensed premises are operated in accordance with the requirements of this ordinance. It is hereby expressly declared

that unannounced inspections are necessary to insure compliance with this ordinance.

* * *

addition to or in lieu of any other remedies set forth herein, commence an action or actions, to abate, remove and enjoin such public and moral nuisance, or impose a civil penalty, in the manner provided by RCW Chapter 7.48A.

Sec. 5.10.220. Limitation of liability.

None of the provisions of this ordinance are intended to create a cause of action or provide the basis for a claim against the City, its officials, or employees for the performance or the failure to perform a duty or obligation running to a specific individual or specific individuals. Any duty or obligation created herein is intended to be a general duty or obligation running in favor of the general public.

Sec. 5.10.230. Violation; penalty – misdemeanor.

In addition to other remedies provided for in this chapter, any person violating any of the provisions of this chapter constituting a misdemeanor shall, upon conviction, be punished by a fine of not more than one thousand dollars ($1,000.00) or by imprisonment for not more than ninety (90) days, or by both such fine and imprisonment, and each and every day during which any violation is committed, continued or permitted shall be deemed a separate offense; *provided,* no person shall be deemed guilty of any violation of this ordinance if acting in an

investigative capacity pursuant to the request or order of the police chief or prosecuting attorney or duly-appointed agent thereof.

Sec. 5.10.240. Additional enforcement.

The remedies found in this chapter are not exclusive, and, the City may seek any other legal or equitable relief, including but not limited to enjoining any acts or practices which constitute or will constitute a violation of any business license ordinance or other regulations herein adopted.

Sec. 5.10.250. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance. Any ordinance or regulation in conflict with this ordinance is hereby repealed.

SECTION 2. REPEALER. That Ordinance No. 2778 as codified in Chapter 5.11 of the Kent City Code is hereby repealed.

SECTION 3. EFFECTIVE DATE. This ordinance shall take effect and be in force thirty (30) days from and

after its passage, approval and publication as provided by law.

_____
JIM WHITE, MAYOR

ATTEST:

_____
BRENDA JACOBER, CITY CLERK

APPROVED AS TO FORM:

_____
ROGER A. LUBOVICH, CITY ATTORNEY

PASSED ___ day of ___, 1995.

APPROVED ___ day of ___, 1995.

PUBLISHED ___ day of ___, 1995.

I hereby certify that this is a true copy of Ordinance No. ___, passed by the City Council of the City of Kent, Washington, and approved by the Mayor of the City of Kent as hereon indicated.

_____(SEAL)
BRENDA JACOBER, CITY CLERK

The Hon. Thomas Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK COLACURCIO, JR., DAVID EBERT, and STEVE FUESTON dba DDF&S INVESTMENT COMPANY, Plaintiffs, v. THE CITY OF KENT, Defendant.	NO. C95-1176Z AFFIDAVIT OF J. P. COVEY

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

JAMES P. COVEY states:

1. I am a detective with the King County Police Department, and I make this Affidavit on my own personal knowledge.

2. After joining the King County Police Department in 1978, I served two years as a patrolman and two years as a detective. Commencing in 1982, I was assigned to work as a detective in Special Investigations for the Vice Control Unit. Except for a break of less than two years, I have worked continuously in that Unit through this date. Part of my responsibilities include investigations of adult

entertainment establishments, including the Deja Vu Club in Federal Way.

3. The City of Federal Way (the "City") contracts with the King County Police Department for law enforcement services. I have been involved in several undercover investigations of the Deja Vu Club in Federal Way, notably in 1990 - 1992 and again in 1995. I have been inside the Deja Vu Club in Federal Way approximately 40 times, with about 10 of those visits occurring in 1995. I am familiar with what constitutes "typical" table dance performances at that Deja Vu Club.

4. *Evidence of Secondary Effects.* I have previously testified that *in the five years I have observed activities in an undercover capacity at the Federal Way Deja Vu, there has been a criminal violation occurring on every visit – either an act of prostitution or a violation of the City's adult entertainment ordinance.* At the time of investigation the Federal Way ordinance prohibited contact but had no distance requirement. Whether these violations occur inside or outside the club is irrelevant to me, because they are all secondary to any lawful dance activity.

5. King County officers conducted a 1993 undercover investigation at the Sugar's nightclub in the Shoreline area. King County *officers purchased 161 table dances, and 160 dances contained some illegal conduct, including nine prostitution cases.* The prosecution of these cases is ongoing; of the three prostitution cases which have gone to trial to date, three resulted in convictions.

6. The number of charges which could be brought for violations of adult entertainment ordinances in King County is limited only by the manpower available in law

enforcement. Violations of adult entertainment codes, illegal sexual conduct, and prostitution are rampant.

7. *The Need for Regulation of Distance.* Kent's prior adult entertainment ordinance (2778) prohibited "touching" of specified body parts (e.g., genitals) between an entertainer and a customer. As I learned from my investigation experience in Federal Way, that type of rule was difficult, if not impossible, to enforce on a regular basis. An officer simply cannot observe violations occurring, due to the proximity of the bodies of the entertainer and customer. Unless the officer is participating in a table dance in an undercover capacity, a violation is extremely difficult to detect. The problems of detection are increased by the low lighting levels. Criminal violations start when you allow the performers to get off stage and perform among the patrons. If regulations kept dancers out of reach of the patrons, it would be easy for an officer to detect sexual contact. The ten-foot table and stage dance distance restrictions in the Kent ordinance do just that.

8. The City's ordinance will enhance substantially the City's ability to detect and prevent this type of conduct. The ten-foot distance requirement and on stage performance requirement will allow law enforcement to effectively stop this activity. The City's ten-foot distance requirement for stage dances will ensure that there is no contact between a stage performer and patron, no matter the height of the patron.

9. *The Need for Licensing Information.* I believe that the licensing information required in Section 5.10.050-5.10.060 of the City's Adult Entertainment Code

are reasonable and necessary for law enforcement. The King County Police Vice Department consists of four detectives, covering Federal Way, Sea Tac, Burien, Woodinville, Shoreline, and all of unincorporated King County. There are not enough officers to perform ongoing undercover operations at any one adult entertainment facility. For example, in 1993 and 1994, those officers were occupied in assisting the City of Federal Way in enforcing its laws regarding massage businesses, and *no* undercover investigation was conducted at the Federal Way Deja Vu.

10. Given the shortage of personnel and the rampant violations, it is necessary to assign officers to the place(s) where the risk of violation is greatest. For that reason, the City's requirements for licensing information are critical. We need personal data, including photographs and fingerprints, to determine the true identity of the persons involved in these clubs. Many use aliases, and virtually all dancers use "stage names." It is also critical to verify the *age* of the performers, because it is our top priority to eliminate juveniles from this business. Similarly, we need information on corporations to determine their true identity and ownership. We also need criminal histories to determine the propensity for violation. If a club has 20 dancers with prior prostitution convictions, we will assign more officers to that [sic] club that a club which has a few performers with prior convictions.

11. I do not believe that adult entertainment clubs must have table or couch dancing to survive economically. In my experience, topless dance clubs in King County have operated successfully without table or couch dancing.

12. From the Fall of 1994 through the Spring of 1995, I met several times with City Attorney Roger Lubovich and members of his staff regarding the secondary effects from adult entertainment establishments and the need to regulate illegal conduct. I had at least four meetings with the City Attorney and spoke with him on the telephone several times through the Fall of 1994 and Spring of 1995.

13. I gave Roger Lubovich a copy of a proposed draft King County ordinance regulating adult entertainment and a copy of an ordinance from the City of Kelso.

14. I assisted in the drafting of the City of Kelso's ordinance and assisted in the amendment of the King County ordinance.

15. During my meetings with the City Attorney, I described my experiences as a King County Vice Detective with the type of illegal activities which typically occur during table or couch dances.

16. In my discussions with the Kent City Attorney I explained that every time I have been to an adult entertainment facility that I have seen criminal violations occur.

17. I explained that in my ten years of experience as a Vice Detective, that the type of dance and the type of conduct which occurs during the dance has become more risque, e.g., dancers solicit and engage in explicit sexual contact with patrons.

18. During my meetings with the City Attorney, I described my participation in undercover investigations at adult entertainment facilities throughout King County.

These investigations led to many arrests for prostitution and adult entertainment ordinance violations and included but were not limited to the examples listed herein.

DATED this 12 day of JUNE, 1996.

/s/ Jan P. Covey
J. P. COVEY

SUBSCRIBED AND SWORN to before me this June 12 1996

/s/ Kimberly Kuhlman
NOTARY PUBLIC in and for the State of Washington, residing at Kent
My Commission expires 6/29/97

Supreme Court, U.S.
FILED
AUG 10 1999
OFFICE OF THE CLERK

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No. 98-2053

In The

Supreme Court of the United States

FRANK COLACURCIO, JR., DAVID EBERT, AND STEVE FUESTON, D/B/A DDF&S INVESTMENT CO.,

Petitioners,

v.

CITY OF KENT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

Of Counsel:

P. CAMERON DEVORE
KRAIG BAKER
ANUJ C. DESAI
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101

GILBERT H. LEVY*
Suite 200, Market Place Two
2001 Western Avenue
Seattle, WA 98121
(206) 443-0670
Counsel for Petitioners Frank Colacurcio, Jr., David Ebert, and Steve Fueston, d/b/a DDF&S Investment Co.

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

I. THERE IS A LACK OF CLARITY IN THE LEVEL OF FIRST AMENDMENT PROTECTION AFFORDED NON-OBSCENE SEXUALLY EXPLICIT SPEECH 1

II. THERE IS A LACK OF CLARITY ON THE QUESTION OF HOW TO DETERMINE A STATUTE'S "PREDOMINANT INTENT" 4

III. THERE IS A LACK OF CLARITY IN THE INTERMEDIATE SCRUTINY TEST'S NARROW TAILORING PRONG 7

IV. THE ORDINANCE FAILED TO LEAVE OPEN ADEQUATE ALTERNATIVE MODES OF COMMUNICATION 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Federal Cases

Ater v. Armstrong, 961 F.2d 1224 (6th Cir. 1992) 7

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 2, 3

BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986)..... 1

Bay Area Peace Navy v. United States, 914 F.2d 1224 (9th Cir. 1990) 7, 9

Board of Trustees v. Fox, 492 U.S. 469 (1989)..... 7

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 4, 5

Clark v. Community For Creative Non-Violence, 468 U.S. 288 (1983) 7, 9

Doucette v. City of Santa Monica, 955 F. Supp. 1192 (C.D. Cal. 1997) 7

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) 7

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981)..... 10

J.L. Spoons, Inc. v. City of Brunswick, ___ F. Supp. 2d ___, No. 1:99CV0477, 1999 WL 322999 (N.D. Ohio May 20, 1999)..... 1

Krantz v. City of Fort Smith, 160 F.3d 1214 (8th Cir. 1998)..... 7

Marks v. United States, 430 U.S. 188 (1977)..... 3

New Jersey Freedom Org. v. City of New Brunswick, 7 F. Supp. 2d 499 (D. N.J. 1997)..... 7

Pennsylvania Alliance for Jobs and Energy v. Council of Munhall, 743 F.2d 182 (3d Cir. 1984) 9

TABLE OF AUTHORITIES – Continued

Page

Richland Bookmart, Inc. v. Nichols, 137 F.3d 435 (6th Cir. 1998) 3

T-Marc v. Pinellas, 804 F. Supp. 1500 (M.D. Fla. 1992) 1

United States v. O'Brien, 391 U.S. 367 (1968) 5

STATE CASES

City of Colorado Springs v. 2354 Inc., 896 P.2d 272 (Colo. 1995) 3

Collier v. City of Tacoma, 854 P.2d 1046 (Wash. 1993) 9

Ino Ino, Inc. v. City of Bellevue, 937 P.2d 154 (Wash. 1997), *cert. denied*, 118 S.Ct. 856 (Jan. 20, 1998) 1

FEDERAL STATUTES

42 U.S.C. § 1988 2

MISCELLANEOUS

Erwin Chemerinsky, *Constitutional Law* (1997) 5

Supreme Court Rule 15.2 6

INTRODUCTION

In its Opposition, Respondent the City of Kent raises no serious argument to dispute Petitioners' contention that the opinion below conflicts with decisions of this Court and other courts of appeals, and raises important and unsettled questions of First Amendment doctrine.[1]

ARGUMENT

I. THERE IS A LACK OF CLARITY IN THE LEVEL OF FIRST AMENDMENT PROTECTION AFFORDED NON-OBSCENE SEXUALLY EXPLICIT SPEECH

The City argues that review is unnecessary because "this Court has clearly set the level of First Amendment protection for sexually explicit non-obscene expressive conduct." Opp. at 5. Nothing could be further from the truth.[2]

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[1] Respondent argues that this Court should not grant certiorari because no court has ever invalidated a distance requirement under the First Amendment. Respondent is mistaken. *See J.L. Spoons, Inc. v. City of Brunswick*, ___ F. Supp. 2d ___, ___, No. 1:99CV0477, 1999 WL 322999, at *9-10 (N.D. Ohio May 20, 1999), cited in the Petition at 24. Even if Respondent were correct, however, this point would be irrelevant to this Petition. Petitioners are not asking this Court to rule categorically that all distance requirements are unconstitutional. Petitioners argue rather that several important questions of First Amendment jurisprudence, questions that transcend the narrow question of the constitutionality of the City's Ordinance, require clarification from this Court; that this case squarely presents those questions; and that, as applied to the facts of this case, the correct answers to those questions require reversal of the opinion below. Statutes regulating the adult entertainment business lie on a continuum. In comparison to the cases the City cites, cases involving either prohibitions on *nude* table dancing only, *see, e.g., BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986), or lesser setbacks, *see, e.g., T-Marc v. Pinellas*, 804 F. Supp. 1500 (M.D. Fla. 1992), the City of Kent's Ordinance is the most restrictive provision ever upheld.

[2] To support this proposition, the City states that "this Court has already refused review of a Washington State Supreme Court decision which decided the very issues presented by Petitioners," referring to *Ino*

First, the Ninth Circuit explicitly recognized the law's lack of clarity. *See* Pet. at 6-7. The City may believe the law is crystal clear, but it is obviously mistaken when it says that "[t]he *only* confusion occasioned by *Barnes* appears to be visited upon the Petitioners." Opp. at 10 (emphasis added). At the very least, the Ninth Circuit too was confused and suggested that only this Court could provide guidance on this question.

Second, the City ignores, as did the Ninth Circuit below, the distinction between nude dancing in particular and erotic dancing in general. The City argues that this Court need not accept review because "courts have uniformly applied time, place, manner analysis . . . to *nude* dancing." Opp. at 7 (emphases added). The Ninth Circuit likewise assumed that this case was about nude dancing. *See* Pet. at A-4 to A-7. But it is not. Rather, the Ordinance being challenged here prohibits table dancing *even when the dancer is wearing both halves of an opaque bikini*. Though table dances are invariably sexually explicit, the dancers need not be nude. Indeed, the City's predecessor Ordinance prohibited nude table dancing but permitted table dancing with a full bikini. *See* Pet. at 2. Petitioners never challenged that statute and were prepared to establish their business under such a legal regime. It was only when the City imposed a complete ban on all table dancing, including table dancing with a full bikini, that Petitioners brought this lawsuit. Petitioners can only speculate that the confusion occasioned by *Barnes* has so infested the law that it has even confused the City of Kent about the scope of its own statute.

Ino, Inc. v. City of Bellevue, 937 P.2d 154 (Wash. 1997), *cert. denied*, 118 S.Ct. 856 (Jan. 20, 1998) (No. 97-858). Opp. at 14. However, the only two questions presented by the *Ino Ino* petition were (1) whether the Washington practice of awarding attorneys' fees to a defendant who prevails in dissolving a temporary restraining order is preempted by 42 U.S.C. § 1988, and (2) whether the petitioners therein were entitled to attorneys' fees under section 1988 when they prevailed on their state constitutional claims. The Court's denial of the *Ino Ino* petition thus has no bearing on this case.

Third, the City is simply wrong when it asserts that "[c]ases have assumed full protection for sexually explicit non-obscene speech." Opp. at 5. The Ninth Circuit did not. *See* Pet. at A-4 to A-7; *id.* at A-26 (Reinhardt, J., dissenting); *id.* at 11. Nor have a myriad of other courts. *See* Pet. at 9-10. Indeed, some courts have clearly stated the view that this Court's cases have created "a kind of legal fiction" that regulations of adult entertainment are automatically content-neutral. *See Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998); *see also City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272, 294 n.16 (Colo. 1995). Indeed, Respondent effectively concedes this point when it says that "courts have uniformly applied time, place, manner analysis applicable to protected expressive conduct to nude dancing." Opp. at 7. Such a comment unmasks Respondent's view (shared by many courts) that *any* regulation of erotic dancing should automatically be subject to time, place, and manner analysis even when content-based on its face and in its effects.

Finally, the City completely misunderstands Petitioners' reason for discussing Justice Scalia's position in *Barnes*. Opp. at 8-9. Petitioners do not claim that Justice Scalia's opinion is law. Rather, Petitioners contend that courts have incorrectly treated Justice Souter's opinion as being the "fifth vote" (and therefore the holding of *Barnes*) because they have misunderstood Justice Scalia's opinion. Under the "narrowest grounds" rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), Justice Souter's opinion would be the holding of *Barnes* only if his opinion had been the "narrowest," in that five votes are necessarily included within his opinion. A proper reading of Justice Scalia's opinion, however, demonstrates that his vote is not included within Justice Souter's. Therefore, Justice Souter's rationale for upholding Indiana's public indecency statute cannot properly be treated as the holding of *Barnes*. Quite simply, when properly read, *Barnes* leaves citizens and courts without a holding and with law that is unclear.

II. THERE IS A LACK OF CLARITY ON THE QUESTION OF HOW TO DETERMINE A STATUTE'S "PREDOMINANT INTENT"

The City's argument with respect to the second question presented by this Petition contains four separate errors. First, the City completely ignores the Circuit split on this question. *See* Pet. at 17-20. The City simply asserts that courts have not "varied greatly in their analysis of the issue," Opp. at 16-17, and yet makes no attempt to engage the wide disparities in caselaw cited by Petitioners.

Second, the City ignores the subtleties in the law. The City does not dispute that this Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), requires courts to determine a statute's "predominant intent" -- nor could it, since this is so obviously the law. Instead, the City claims that the law is crystal clear. According to the City, "a court should consider whether an ordinance is actually designed to further a legitimate, enunciated government purpose." Opp. at 16. But, such a characterization simply begs the question on which Petitioners seek certiorari; namely, "How does a court determine whether an ordinance is 'actually designed' to further a legitimate purpose?" According to the City, a regulation expressly aimed at a particular form of expressive activity must be deemed content-neutral as long as a municipality can merely produce a study showing the existence of a non-speech related problem. Indeed, notwithstanding some discussion to the contrary, this is ultimately what the Ninth Circuit held. *See* Pet. at 20. Under this reasoning, it is irrelevant how much evidence a statute's challenger might provide to demonstrate that a statute was "actually designed" to suppress expressive activity, as long as the municipality provides *some* evidence of "secondary effects." Such a standard must be wrong because it permits no inquiry whatsoever into even the objective factors surrounding the passage of a piece of legislation. In any event, the City simply ignores the difficulties courts have in determining the standards "for determining when an illicit but inconsequential 'motivating factor' . . . develop[s] into an illicit and controlling

'predominant purpose.' " Pet. at A-10 (citing Erwin Chemerinsky, *Constitutional Law* § 11.3.4.4, at 840 (1997)). This case presents a perfect example of a situation in which almost all the evidence points to the conclusion that the Ordinance was designed to ban a particular form of expressive activity because of disagreement with the message being conveyed; and yet, because the City was able to point to a fifteen-year old study and an affidavit, the court below abdicated its responsibility to determine the Ordinance's "predominant intent."[3]

Third, the City ignores the fact that Petitioners' evidence consisted primarily of objective facts surrounding the passage of the Ordinance and its actual effect. *See* Pet. at 13 n.6; *id.* at 20. The City spends more than three pages of its brief simply reiterating the standards announced in *O'Brien*. *See* Opp. at 15-18. But Petitioners do not dispute the validity of *O'Brien* – nor need they do so in order to prevail in this case.[4] Rather, Petitioners argue simply that this Court's jurisprudence is not as straightforward as the City contends and that an appropriate inquiry would lead to the conclusion that the "predominant intent" of the ten-foot distance rule was to effect a complete ban on table dancing in order to exclude adult entertainment establishments from the entire city. Indeed, the City simply ignores those cases cited on pages 16 and 17 of the Petition, cases in which this Court has made clear that courts must look beyond the government's *articulated* justification when determining whether a law is content-neutral, even if the law is

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[3] Indeed, under the City's view, it does not matter whether the "secondary effects" study is based upon invalid conclusions, unreliable data, or even patent falsehoods. Under this constricted view of the First Amendment, almost any conceivable regulation can be justified by reference to the same study proclaiming the existence of secondary effects.

[4] In any event, *O'Brien* is clearly distinguishable. *O'Brien* dealt with a generally applicable statute, which did not apply on its face to speech; there was therefore no inherent reason to question the legislative purpose. In contrast, the City of Kent's ten-foot distance rule applies only to expressive activity. Where a law aimed directly at expression is being challenged, legislative purpose is the central inquiry. *See Playtime Theatres*, 475 U.S. at 47.

neutral on its face. Instead, the City persists in its simplistic view that it need merely articulate a non-speech related justification for its statute, submit a "secondary effects" study to the court, and confidently expect to survive the intermediate scrutiny test.

Finally, in Part III.B of its Opposition, the City is wrong in its claim that the Ninth Circuit looked to the full record. Even a cursory read of the opinion demonstrates that the court failed to consider certain aspects of the record. No part of the Ninth Circuit's opinion addresses several of the objective facts indicating a content-based purpose that Petitioner alludes to on page 20 of the Petition. The mere incantation that a court has looked at the "full record" can hardly be sufficient when First Amendment rights are at stake.[5]

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[5] In footnote 1 of the City's Opposition, the City claims that Petitioners have misrepresented the evidence below. The City is wrong. The City does not contest that the McLaughlin declaration found at Appendix E of the Petition is a true copy of evidence submitted to the courts below. Rather, the City contends that the McLaughlin declaration itself misstates certain facts about the legislative record and that, because Petitioners rely on the McLaughlin declaration, "Petitioners have misrepresented evidence below." Opp. at 2 n.1. The City obviously misunderstands the role evidence plays in a lawsuit and the purpose of Supreme Court Rule 15.2. The City may not, at this stage of the proceedings, claim that uncontested evidence in the record is inaccurate simply because its lawyers say so in a brief. The City failed to submit any evidence in the district court to support its current claim and is therefore estopped from arguing based on facts it failed to submit below. The City may not use Supreme Court Rule 15.2 to submit new "evidence" to this Court. In any event, this case was appealed from a grant of summary judgment in favor of the City. Therefore, even if there had been a dispute below as to whether the April 10, 1995 meeting involved the Planning Commission or the Planning Committee, the district court would have been required to resolve that question in Petitioners' favor.

III. THERE IS A LACK OF CLARITY IN THE INTERMEDIATE SCRUTINY TEST'S NARROW TAILORING PRONG

The City's argument with respect to the third question presented by the Petition is two-fold. First, the City argues that the "reasonable fit" language is inapplicable to non-commercial speech cases because many of the commercial speech cases involved content-based regulations. Second, the City argues that, even if the Ninth Circuit had required the Ordinance to pass muster under the more stringent "reasonable fit" test, the result would have been the same. The City is wrong on both counts.

The City's first argument suffers from three fundamental flaws. First, it ignores the fact that commercial speech has generally received less First Amendment protection than non-commercial speech. *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). Second, it ignores the fact that this Court has explicitly stated that "the application of the [commercial speech] test [is] substantially similar to the application of the test for validity of time, place, and manner restrictions upon protected speech." *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (internal citation omitted). Third, in contrast to the Ninth Circuit in this case, many lower courts have applied the "reasonable fit" test specifically in "time, place, and manner" cases not involving commercial speech. *See Krantz v. City of Fort Smith*, 160 F.3d 1214, 1221 (8th Cir. 1998); *Ater v. Armstrong*, 961 F.2d 1224, 1229 (6th Cir. 1992); *cf. New Jersey Freedom Org. v. City of New Brunswick*, 7 F. Supp. 2d 499, 509 (D. N.J. 1997); *Doucette v. City of Santa Monica*, 955 F. Supp. 1192, 1205 (C.D. Cal. 1997). This Court should grant certiorari in this case to make clear that the "reasonable fit" test is equally applicable to the *O'Brien/Ward* line of cases in general and to sexually explicit expressive activity in particular.

The City's second argument is also flawed. First, the City ignores that the burden of proving the "narrow tailoring" prong is on the government. *See, e.g., Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990) (citing *Clark v.*

Community For Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984)). The Ninth Circuit, in the case below, made the exact same mistake: "[Petitioners] have failed to present evidence showing that a ten-foot rule burdens substantially more expression than necessary to achieve its purpose." Pet. at A-17. The City had the burden to show that the ten-foot rule bears a "reasonable fit" to a legitimate goal, and it failed to do so. Second, the City ignores the obvious less-burdensome alternatives (which the Ninth Circuit likewise either ignored or improperly treated as insufficient). Besides the no-touch rule, *see id.* at 23-24,[6] the City could have increased enforcement of prostitution and drug laws. If preventing the secondary effects of table dancing – namely, prostitution and drug solicitation – had really been the City's "predominant purpose," such increased enforcement would have been a more direct manner of accomplishing its goal. That a law imposing a complete ban on a form of expressive activity would make it "easy" to enforce pre-existing laws, *see* Opp. at RA 198 ¶ 7, can hardly be sufficient to sustain its constitutionality under the "narrow tailoring" test.

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[6] The Ninth Circuit concluded that the "no touch" rule was not a reasonable alternative for two reasons: one, because it would "permit verbal communication between dancers and patrons, thereby failing to curtail propositions for drugs or sex"; and, two, because it would be unenforceable as it would "fail to provide sufficient line-of-vision for law enforcement personnel." Pet. at A-17. As noted in the Petition, the court's first rationale, if left to stand, would raise serious overbreadth problems. *See* Pet. at 24. The second rationale is equally specious. As the City's own evidence demonstrates, the no-touch rule could easily be enforced by undercover officers posing as customers. *See* Opp. at RA 198 ¶ 7 (acknowledging that violations are not difficult to detect when "the officer is participating in a table dance in an undercover capacity"). Indeed, the City's primary evidence of the secondary effects associated with table dancing were based on observations made by undercover officers. *See id.* at RA 197 ¶ 4.

IV. THE ORDINANCE FAILED TO LEAVE OPEN ADEQUATE ALTERNATIVE MODES OF COMMUNICATION

The thrust of the City's argument as it relates to the Petition's fourth question is that the fact that table dancing is a unique mode of expression does not, by itself, entitle table dancing to protection from laws that effect a complete ban on such expression. The City's argument fails to undermine Petitioners' contentions for two fundamental reasons.

First, the burden of proof on this question is on the government. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1226 (9th Cir. 1990); *Collier v. City of Tacoma*, 854 P.2d 1046, 1057 (Wash. 1993); *see also Pennsylvania Alliance for Jobs and Energy v. Council of Munhall*, 743 F.2d 182, 193-94 (3d Cir. 1984) (Becker, J., dissenting). Yet, the City utterly fails to point to a single shred of evidence that there are alternative avenues of communicating the same message or to anything in the Ninth Circuit opinion doing so either. Opp. at 29. Instead, as noted in the Petition, the Ninth Circuit chose to analogize table dancing to lap dancing, thus demonstrating its view that the expression embodied in table dancing is itself proscribable sexual conduct. *See* Pet. at 27-28.

Second, Petitioners do not dispute that uniqueness alone is insufficient to entitle table dancing to separate First Amendment protection. Petitioners do not contend that, were there in fact alternative modes of communicating the same message, table dancing could not be restricted. Rather, Petitioners argue simply that there are no alternative avenues for the protected expression. Given the uncontroverted evidence in the record that table dancing and stage dancing express fundamentally different messages, erotic stage dancing is obviously not an alternative means of communicating the ideas expressed in erotic table dancing. Given that stage dancing does not satisfy the requirement, the question, then, is whether the absolute ban on table dancing leaves open *any* adequate alternative avenues for expressing the same message. As the City itself acknowledges, in both of the primary cases on which it relies, *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 294-95

(1983), and *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 654-55 (1981), the Court *expressly* found that alternate means of communicating the message existed, *explicitly stating what those means were*. *See* Opp. at 27-28. In marked contrast, the Ninth Circuit below fails to articulate any other way in which the table dancer can convey her message.[7]

CONCLUSION

This Petition presents four important questions of First Amendment doctrine, each of which raises independent grounds for this Court to hear this case. For the reasons stated in the Petition and this Reply Brief, Petitioners respectfully request that this Court grant the Writ.

Respectfully submitted,

Of Counsel:

P. CAMERON DEVORE
KRAIG BAKER
ANUJ C. DESAI
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101

GILBERT H. LEVY*
Suite 200, Market Place Two
2001 Western Avenue
Seattle, WA 98121
(206) 443-0670
Counsel for Petitioners Frank Colacurcio, Jr., David Ebert, and Steve Fueston, d/b/a DDF&S Investment Co.

**Counsel of Record*

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[7] This is not surprising, for it illustrates another fundamental difference between this case and the cases cited on pages 26 through 29 of the City's Opposition. All the cases cited by the City involve media of communication designed to convey a political or religious message. In contrast, table dancing is more akin to artistic expression. In the arts, the medium and message are so closely intertwined that banning the medium is tantamount to banning the message itself. Analogous examples might be a regulation prohibiting tap dancers from wearing taps on their shoes or one that prevents opera singers from singing arias.